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CONVEYANCER'S NOTEBOOK.

A year of war has added considerably to the mass of legislation which concerns the conveyancer, even though the exigencies of the time may have diminished his practice. This legislation comprised, as much of it is, in Statutory Rules and Orders, presents a serious problem for a journal, particularly one published quarterly. We hope to minimise the inconvenience by including from time to time a summary in the form of an index which should put the practitioner on notice of what may concern him. It is hoped also to continue articles which may help to keep the law up to date. At the same time it is felt that it is in the best interests of all that the Journal should continue to devote a reasonably large space to matters which are not of such an ephemeral character as we hope this war legislation to be.

Some mention in this place ought perhaps to be made of the Emergency Powers (Defence) Act, 1940, extending the scope of the 1939 Act. It provides in one section for Orders enabling person and property to be requisitioned, if we may put it that way, whenever it is necessary or expedient for securing the public order or the efficient prosecution of any war, or for maintaining supplies or services essential to the life of the community. This is, of course, a very drastic provision. It would, it is thought, be very difficult to show that an Order was *ultra vires* for all these purposes, and presumably as long as it satisfied one purpose it would be valid. For example, it would seem difficult to resist a claim

to make an Order for army conscription without a new military services Act. The most remarkable feature of the provision from the point of view of the conveyancer, however, is that the Act makes no provision for any form of compensation for requisition of property. Should Orders be made under this Act the question may arise whether special provision may be made for compensation, or if no provision for compensation is made whether such a requisition automatically falls under the existing legislation. Statutory Orders made under this Act will require careful attention if and when they are made.

Middlesex Deeds Registry.—The Middlesex Deeds Registry shall be closed: Middlesex Deeds Act, 1940. When it shall be closed the Act does not seem to say directly, but the Act took effect on July 10, 1940. This is a natural corollary to the incorporation of Middlesex in the compulsory area of the Land Registry and to the Middlesex Deeds Act, 1936 (noted *ante*, Vol. I, pp. 94, 356). It must, however, be remembered that in Middlesex land only appears on the Register at the Land Registry after a dealing which involves registration, such as a conveyance on sale. A mortgage does not require the land to be registered.

No search can now be made in the Middlesex Registry, and section 197 of the Law of Property Act, 1925, which provides that registration of instruments transferring or creating a legal estate shall be deemed to constitute actual notice, ceases to be effective with regard to land in Middlesex. On the other hand, the closing of the Registry does not affect the consequences of the failure to register prior to the closing of the Registry.

Section 1 (2) of the Act may give rise to difficulty. It provides that a purchaser after the commencement of the Act shall have the same rights as if no memorial had been registered provided he has no notice. Section 2 (3) of the Act, then, provides that priorities of puisne mortgages, that is mortgages not protected by a deposit of title deeds, shall have priority according to registration under the Land Charges Act, 1925, under section 97 of the Law of Property Act, 1925. What is not clear from the Act is whether it is proposed automatically to transfer all puisne mortgages registered under the Middlesex Act to the Land Charges Register. The Act simply provides (section 2 (1)) that such mortgages shall be registrable, and (section 2 (2)) that no fee shall be payable on registration. Owners of puisne mortgages must, therefore, see that they are protected by entry on the Land Charges Register, or they may find that subsequent dealings with the land have destroyed

their priority. In order to modify this difficulty there is an indemnity clause for persons suffering loss. This indemnity can only be claimed, however, in respect of an unregistered puisne mortgage provided that the loss is not caused or substantially contributed to by the applicant and that the mortgage has been registered as a land charge during the twelve months succeeding the date of the Act. This section definitely imposes upon the owner of a puisne mortgage the obligation to see that his charge is in fact registered under the Land Charges Act.

In order to avoid difficulties arising from no further search being available and from the preservation of the requirement of registration of all instruments executed prior to July 10, 1940 (*a*), it is provided (section 4) that a certificate by an officer of the Middlesex Deeds Registry indorsed on the instrument shall be conclusive evidence of registration of a memorial. Further a writing on an instrument purporting to be such a certificate shall be deemed to be such a certificate unless the contrary is shown. It would seem that a puisne mortgage, which should have been registered but has not been registered, and cannot of course now be registered, would be protected by registration as a land charge as from the date of registration (section 1 (3)). It is not clear that a first mortgage would be equally protected. Section 97, which is applicable to land in Middlesex after July 10, does not apply to first mortgages protected by a deposit of title deeds. On the other hand there does not appear to be any provision which exempts these mortgages from the consequences of not having been registered in the local Deeds Registry (*a*).

The effect of the Act will, therefore, simplify the position of the purchaser of land in Middlesex who will be relieved of the burden of search in the Deeds Registry, where the land is not already registered in H.M. Land Registry, and he will be protected against all mortgages not protected by deposit of title deeds or by registration as a land charge. The Act will save trouble to persons lending money on mortgage after the date of the commencement of the Act, since their mortgage will follow the ordinary rules for unregistered land or for registered land (section 1 (2)). The position of those who have lent money prior to the date of the Act may not be so enviable, but at least in the case of mortgages protected by a deposit of title deeds and whose mortgage was registered in the Deeds Registry, there is no ground for any difficulty.

(*a*) But under the Land Registration Act, 1936, s. 2 (2), a memorial was not to be registered of any deed executed subsequently to January 1, 1937, so that this provision really relates to instruments executed prior to that date, though they may have been registered since 1936.

THE COURTS (EMERGENCY POWERS) ACTS, 1939 AND 1940.

A REVIEW IN RETROSPECT.

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The Courts (Emergency Powers) Acts, 1914—1919.

Although the Courts Emergency Powers Act, 1939, was closely modelled on the Acts of 1914 it is remarkable how very little attention, comparatively speaking, has been directed during the last twelve months to the construction put upon the latter Acts during and after the Four Years War. On one occasion the author heard a barrister of experience actually contending in the county court that as the 1939 Act had been passed at very short notice by Parliament and was an entirely new and untried idea it ought to be interpreted in a manner different from other statutes, yet the construction which he was seeking to maintain was one which, after a full and careful argument, had been rejected in 1915.

In most cases where the decisions of the earlier epoch have been referred to they have been either dissented from or distinguished. In *Att.-Gen.* v. *Hancock*, [1940] 1 K. B. 427, which raised the question whether or not the 1939 Act applied to the Crown, Wrottesley, J., distinguished the decision in *Att.-Gen. of Duchy of Lancaster* v. *Moresby*, [1919] W. N. 69, and an Irish decision in *Irish Land Commissioners* v. *O'Neil*, [1914] 2 Ir. R. 66, and, applying the ordinary principles of construction, held that in the absence of a declared or apparent intention the Act must be read as not restricting the rights of the Crown; and in his long and careful judgment in *Soho Square Syndicate, Ltd.* v. *E. Pollard & Co.* (1940), 56 T. L. R. 764, Farwell, J., in effect, decided that although the Act of 1914 and that of 1939 were *in pari materia* the circumstances with which they were designed to deal had so changed that a diametrically opposite construction ought to be put upon the later Act. In *Re Sandow*, [1916] W. N. 262, which was quoted with approval in *Anchor Trust Co.* v. *Bell*, [1926] Ch. 805, it had been held that the protection of the 1914 Act could be waived by the debtor for whose behalf it had been passed; the decisions were not very satisfactory in that there did not appear to have been a full argument, but Farwell, J., felt that right or wrong they did not

prevent him from holding that the protection of the 1939 Act was inalienable and that the consent of the debtor was not sufficient unless the leave of the appropriate Court was also obtained. More will be said about this decision at a later date but here it may be remarked that it is matter for comment that the 1940 Act very shortly afterwards enabled the appointment of a receiver of the rents and profits of a mortgaged dwelling-house to be made on the *ex parte* application of the mortgagee thus, it is submitted, recognising that such an appointment is often of value to the mortgagor in preserving his equity and saving the property from dereliction and ruin.

It is not meant to suggest by what has been said above that the 1939 Act was an exact reproduction of the legislation of 1914 and later years. It differs from it in a number of respects, but the resemblance is particularly close in the section which deals with what we are accustomed to-day to call the suspension of leave to proceed. Section 1 (2) of the 1914 Act ran—

> "If, on any such application, the court to which the application is made is of opinion that time should be given to the person liable to make the payment on the ground that he is *unable immediately to make the payment by reason of circumstances attributable, directly or indirectly, to the present war*, the court may, in its absolute discretion, after considering all the circumstances of the case and the position of the parties, by order, stay execution or defer the operation of such remedies as aforesaid, for such time and subject to such conditions as the court thinks fit."

The words underlined are with slight grammatical alterations identical with those in section 1 (4) of the 1939 Act. They were considered in *Stirling* v. *Norton* (1915), 31 T. L. R. 293, where the opinion was put forward that a debtor who had been unable to pay his debt before the outbreak of war might still be entitled to the protection of the Act if his position had been made materially worse by the war. This is of particular interest in view of the very strong tendency to-day to hold that if the debtor fails to establish that he could have paid the debt in question before September, 1939, he cannot claim the protection of the present Acts—a view which, though widely prevalent, is, it is submitted, not entirely in accordance with the principles enunciated in *A.* v. *B.*, [1940] 1 K. B. 217.

It is also interesting to note that no mention was made in the case of *S. and A. Services* v. *Dickson*, [1940] 2 K. B. 219, of the decisions in *Re Farnol Eades, Irvine & Co., Ltd.*, [1915] 1 Ch. 22 and *Ness* v. *O'Neil*, [1915] 1 K. B. 706, both of which supported

the decision eventually reached—namely, that the remedies referred to in section 1 (2) (a) of the 1939 Act are all extra-judicial and that no leave was therefore necessary to enforce a judgment for the delivery of possession of a chattel (*a*).

The Acts of the Four Years War differed from that of 1939 both in arrangement and in effect. In particular they extended to restrict the enforcing of the lapse of any policy of insurance (1914 Act, s. 1 (1) (b)), contained special protection for men serving in the forces (1916 Act, s. 1), even though their inability to pay was not shown to be directly or indirectly due to the war, created a power in the Court to determine their leases (1916 Act, s. 2), gave special powers to suspend the period of prescription from running in cases where the prohibition or impossibility of building might otherwise have led to the establishment of a right to light (1916 No. 2 Act, s. 3) and eventually conferred a power to suspend or annul or, with the consent of the parties, amend, any contract the performance of which could not be enforced without serious hardship resulting from the war (1917 and 1919 Acts). The 1914 Act was also expressed to extend to proceedings under the Small Tenements Recovery Act, 1838.

No powers similar to these will be found in the 1939 Act. Except for industrial policies and policies with friendly societies (*b*) no protection is given to-day to the policy-holder, the authorities feeling justified in leaving this matter to the good sense and fair play of the companies concerned. Nor is there any power to suspend, annul or vary contracts. The Committee on War Damage to the Subject Matter of Contracts advised against any such powers though they supported the proposed revision of the monstrous rule in *Chandler* v. *Webster*, [1904] 1 K. B. 493, which had been strongly recommended by the Law Revision Committee (*c*). Some such provision will, however, be found in other branches of the emergency legislation and the reader who is interested is directed to the Ministry of Supply Act, 1939, s. 7, the Priority of Work Order, 1939, and the truly startling provisions of the Limitation of Supplies (Miscellaneous Provisions) Order, 1940 (*d*).

There is one other matter in which the present Act differs materially from its predecessors and it is curious that, despite its importance, very little if any attention appears to have been given

(*a*) This decision has now been reversed by the Courts (Emergency Powers) Act, 1940, s. 4 (1).

(*b*) Industrial Assurance and Friendly Society (Emergency Protection from Forfeiture) Act, 1940.

(*c*) 1939, Cmd. 6009.

(*d*) S. R. & O., 1940, No. 874.

to it. The 1914 Act, whilst it restricted the exercise of the rights of mortgagees of property other than land (land being of course also dealt with) left completely unfettered the right of a mortgagee of chattels to sell *provided he was in possession.* The 1939 Act requires *both* that he should be in possession *and* that his right of sale and notice of his intention to exercise that right should have arisen and been given respectively before September 2, 1939. It will be submitted later that the full effect of this has been by no means fully appreciated.

Purpose of 1939 Act.

The general scope and purport of the modern Acts—the Courts Emergency Powers Acts, 1939 and 1940—are too well known to call for comment but it is hoped that a recapitulation of some of the more important principles will not be entirely otiose.

In September, 1939, opinion on the effect of the Act fell into two main classes. On the one hand there were those, and they probably by far the more numerous, who regarded it as in effect a moratorium designed to put the debt into " cold storage " for at least the duration of the war and to bring into existence a debtors' paradise. This accounted for the innumerable people who considered that the outbreak of war was in itself a sufficient justification for the disregard of all their contractual obligations and that it gave to them that inestimable opportunity so often asked for by the convicted criminal of " another chance ". The other school represented the creditors who sought to treat the Act as one passed, at least in part, in order to secure the equitable distribution of assets and to prevent the very unequal payment of obligations which so often results from the preference given by the law to the creditor who has secured the first judgment.

Both these views were put before the Court of Appeal in *A* v. *B*, [1940] 1 K. B. 217, where the first considered decision on the 1939 Act was delivered. Neither of the two views was entirely successful. The Court declared that the onus of discharging the requisite obligations of proof rested upon the debtor, and we shall see how heavy that onus may be, but they also affirmed the contention that the Act was passed for the protection of debtors and rejected the contrary view that it was in any sense there for the equitable distribution of assets. As Greene, M.R., said : " Counsel for the appellants sought to treat the Act as one passed for the benefit of creditors generally, with a view to securing an equal distribution among them of the debtor's available assets, with the result that the Court in such a case as the present would become involved in some sort of quasi-bankruptcy administration.

As we read the section, its object is not that of the protection of creditors generally, but the protection of debtors against the enforcement of judgments obtained against them."

This protective quality of the Act was still further emphasised by Farwell, J., in *Soho Square Syndicate, Ltd.* v. *E. Pollard & Co.* (1940), 56 T. L. R. 764.

> "Where in an Act there is no express prohibition against contracting out of it, it is necessary to consider whether the Act is one which is intended to deal with private rights only, or whether it is an Act which is intended, as a matter of public policy, to have a more extensive operation. The similar Acts in the last war were construed as prohibitions upon the private rights of the mortgagee as against the mortgagor, and in those circumstances there was nothing to prevent a mortgagor and a mortgagee in agreeing to contract out of the Act. I think that in considering this question I must take into consideration the fact that since the last war, during the years that have elapsed down to the beginning of the present war, the position with regard to mortgagors and mortgagees has very largely changed. . . . It must be remembered that large numbers of persons in that position [*i.e.*, mortgagees liable to eviction] are persons who have little or no knowledge of law, and, moreover, are persons who have little or no opportunity of obtaining legal advice; and consequently, there is a very much larger class of persons now than there was in the last war calling for some sort of protection."

But it is not safe to shut one's eyes to the position of the creditor; as Goddard, L.J., said in *Metropolitan Properties Co., Ltd.* v. *Purdy*, [1940] 1 All E. R. 188: "The Act does make the position of the defendant a crucial matter, but, at the same time, one cannot altogether avoid taking into account the position of the creditor."

This was a case of landlord and tenant, the tenant proving that he was just able to continue to run the hotel he had leased from the landlord and to pay all his other debts in full (except rates for which a special agreement had been reached) if nothing whatever was paid by way of rent. The Judge in chambers gave leave to distrain suspended so long as a certain sum was paid each month and the Court of Appeal refused to interfere with this order, pointing out that it was essentially a matter for the Judge's discretion and being careful not to say that they would necessarily have reached the same result themselves. Nevertheless they agreed that regard must be had to the position of the creditor, for it would be unjust that he should have to carry the whole burden of the

debtor's misfortunes, more especially as he in his turn—as so few debtors or their advisers will remember—has obligations to meet and creditors to satisfy.

Very similar decisions will be found in *Blanket* v. *Palmer* (1940), 56 T. L. R. 469, and *Brandon* v. *Reidy*, [1940] 2 K. B. 194, and it has been said that the duty of the Court is to do "a sort of distributive justice" (*Brandon* v. *Reidy*, *supra*).

"*Leave to proceed.*"

The provisions of the Act vary according to the nature of the right or remedy sought to be enforced, but they may be conveniently divided into three classes. First of these comes those cases in which leave is necessary before a "remedy" may be enforced; then comes the cases in which, although there is no restriction on the commencement and prosecution of proceedings, nevertheless no step may be taken to enforce a judgment or order until leave has been obtained, and lastly comes the smaller class of cases where leave is necessary before proceedings may even be begun.

It is not proposed to recapitulate the cases in which leave is necessary under section 1 (2) (a); they include the levying of distress, the taking possession of any property, the realisation of any security or the forfeiture of any deposit. Until the decision in *S. and A. Services, Ltd.* v. *Dickson*, [1940] 2 K. B. 219, there was some doubt whether this sub-section applied to the enforcing of judgments for the delivery of possession, but that case decided (in accordance with precedents of the Four Years War) that the remedies referred to were extra-judicial and that there was no restriction on the enforcement of a *judgment*. The curious anomaly thus produced by which possession could not be taken without a judgment but a judgment once obtained could not be restrained was made much of in argument, but the Court pointed out that this was a matter for Parliament rather than for judicial construction. Parliament was quick to act upon the hint and the Courts Emergency Powers Act, 1940, so amends section 1 (3) of the 1939 Act that leave will in future be required for the enforcement of a judgment for the delivery of possession of a chattel on the ground of non-payment of money. Where there is a right to possession as a result of a breach of contract other than by non-payment of money the principles of *S. and A. Services, Ltd.* v. *Dickson* (*supra*) will continue to apply—the exercise of any remedy will be restricted by section 1 (2) (a) but there will be nothing to prevent the immediate execution of any judgment for delivery of possession.

This decision should successfully remove a difficulty which has troubled some Courts. It has been argued that even where a judgment for possession of land has been obtained upon some ground other than non-payment of rent leave is necessary to enforce the judgment because the plaintiff is exercising a remedy by way of taking possession of the land or by way of re-entry (see, *e.g.*, *Judge Whitmore-Richards*, [1940] L. J. N. C. C. R. 28). Since the recent decision referred to there can be no doubt that this view is wrong and it may be here remarked that there is nothing anywhere in the Acts to restrict the obtaining of possession by execution of a judgment obtained on the ground of a valid notice to quit or a breach of covenant to repair.

Returning to chattels it may be pointed out that there still remain some apparent loopholes of use to hire-purchase companies. In an article in the last issue of *The Conveyancer* written before the decision in *S. and A. Services, Ltd.* v. *Dickson* (*supra*) the author submitted that a hire-purchase company which has determined the hire-purchase agreement (and not merely the hiring under the agreement) is probably entitled to resume possession without leave as to do so is not to exercise a remedy but rather to rely on a common law right arising out of its ownership. It is thought that this remains so despite both decision and amending Act. The Act, however, creates a new and interesting point. It provides (Courts (Emergency Powers) Act, 1940, s. 4 (1)) that leave shall be necessary to enforce a judgment for the "delivery of any property other than land by reason of a default in the payment of money". But what of the company which determines the agreement (*e*) on the ground of non-payment of money and, having done so, relies solely on its legal title? If the law is to be logically interpreted it is thought to be clear that no leave is necessary, but if on the other hand a generous construction is given to the Act it may be held that the company's action originates in the non-payment of money and is therefore within the mischief which this section is designed to meet.

The author, with some hesitation, submits that the former is the more proper construction.

"*Exercise a remedy.*"

The precise meaning of "exercise a remedy" has been con-

(*e*) Two rights are usually created by a hire-purchase agreement: (i) to determine the hiring and, alternatively, (ii) to determine the agreement. In the former case there is a contractual obligation to return the chattel but in the latter the contract ceases to exist and the company is entitled to take possession by virtue of its ownership (cf. *Blades* v. *Higgs* (1861), 10 C. B. (N.S.) 713).

The provisions of the Hire-Purchase Act, 1938, may affect these rights in the cases to which it applies.

sidered on occasions by the Courts in other cases. The cutting off of gas supplies is not within the section (*Parry* v. *South Metropolitan Gas Co.*, [1940] 1 All E. R. 591) but the forfeiture of shares for non-payment of calls is (*Burgess* v. *O. H. N. Gases, Ltd.* (1914), 31 T. L. R. 59); for it is a 'taking of possession'. It remains an open question whether the service by a head lessor of a notice under the Law of Distress (Amendment) Act, 1908, upon a sub-lessee requiring payment of rent direct is affected by the Act, but it is submitted that it is not.

Mortgages of chattels.

The rights of mortgagees of chattels were considered in two decisions arising out of the Four Years War. In *Ziman* v. *Komata Reef Gold Mining Co., Ltd.*, [1915] 2 K. B. 163, and *Foster* v. *Barnard*, [1916] 2 A. C. 154, it was held that a stockbroker who holds shares as security for his clients' debts to him is a mortgagee in possession. In both these cases the brokers had sold the shares but were not affected by the 1914 Act as it was so drawn as not to require leave where the mortgagee was in possession. The 1939 Act is much narrower; by section 1 (2) proviso (b) it is enacted that no leave is necessary for the realisation of a security by a mortgagee in possession of property other than land "*where the power of sale has arisen and notice of the intended sale has been given before the commencement of this Act*". It is thought that many brokers' sales in September and October must have disregarded this provision and the mortgagees thereby have rendered themselves liable to damages (*Foster* v. *Barnard*, *supra*). Nor has it been fully realised that the enforcement of a bill of sale or the negotiation of a promissory note or bill of exchange *given as a collateral security* (but not when given in satisfaction as payment) will fall within the Act. There have been cases where banks, handed post-dated cheques to hold for collection or share certificates as security for an overdraft, have exercised their rights as chargees with a complete disregard of the formalities required by the Act.

Forfeiture of deposits.

Neither in this war nor during the last has the author been able to discover any instance of judicial explanation of the many difficulties created by the restriction in section 1 (2) (a) on the forfeiting of a deposit without leave. Two decisions have been reported, but neither of them deals with the effect of the section. In *Re Griffiths*, [1940] 1 All E. R. 528, forfeiture of a deposit on a contract for the purchase of land was resisted on the ground of inability to complete but the Court held the Act inapplicable as it

was extremely doubtful whether the debtor could have found the necessary money even in peace time since the whole transaction was of a highly speculative nature. The second case was *Broadstairs Picture House* v. *Littman* (1940), 56 T. L. R. 942, in which a vendor successfully applied for an order of rescission and forfeiture on the ground that the purchaser had failed to comply with a decree of specific performance. In such a case the jurisdiction of the Court to order forfeiture does not arise out of the contract at all but is really an illustration of its powers over a person in contempt, and on this ground it was held that no question of leave under the Act could arise. Two alternative possibilities must be envisaged, for a deposit may either have been paid to the vendor or an agent for him or it may have been handed to a stakeholder (*Hall* v. *Burnell*, [1911] 2 Ch. 551). Now in either case if the purchaser defaults in his performance of the contract and the vendor elects to rescind, the purchaser has lost all right to the return of the deposit. Apart from the Act the vendor may in the first case retain the deposit and in the second demand it from the stakeholder and give him a good discharge for it. The effect of the Act would seem to be to deprive the vendor of the benefit of his rights without conferring upon the purchaser any corresponding advantage. There is no power to order the return of the deposit to the purchaser and the stakeholder who does so will, it is conceived, remain liable to the vendor and could not rely on the purchaser's receipt as a discharge once the vendor has obtained leave or the restriction imposed by the Act has been removed. Unless the contractual rights of the parties can be modified there seems to be little point in this provision of the Act; and in any event its effect is more limited than at first sight might appear, for even if the Act is of some advantage to the purchaser in postponing the time when the forfeiture becomes effective it must be remembered that, as a result of the decision in *S. and A. Services, Ltd.* v. *Dickson* (*supra*), there will be no restriction on the enforcing of a *judgment* of forfeiture, for this sub-section of the Act only deals with extra-judicial remedies.

There are two further matters of possible importance which are worthy of note. It is only money which has been paid as a deposit —that is, as a guarantee for the purchaser's due performance— that may ever be forfeited; there is no similar right in the vendor to retain any other money paid on account of the purchase-money (*Palmer* v. *Temple*, 9 A. & E. 508, 520); and further, even the right to forfeit deposits will be excluded if a contrary intention can be inferred from the terms of the contract (*ibid.*). Secondly, the right of forfeiture is ancillary to that of rescission so that the vendor who

sues for *damages* cannot claim to retain the deposit in addition to claiming full damages (*Ockenden* v. *Henly*, E. B. & E. 485). But he may retain the amount of the deposit or claim it from a stakeholder as *part payment* of the price, in which case his claim to damages will be *pro tanto* reduced (*Ockenden* v. *Henly*, *supra*; *Howe* v. *Smith*, 27 Ch. D. 89; *Shuttleworth* v. *Clews*, [1910] 1 Ch. 176) (the decision in *Essex* v. *Daniell*, L. R. 10 C. P. 538, to the contrary, is, it is respectfully submitted, erroneous). Where a vendor elects to claim damages instead of rescission it is conceived that no question of leave under this sub-section (section 1 (2) (a)) can possibly arise; leave will, however, be necessary to enforce the judgment under section 1 (1). Where, on the other hand, a *judgment* of rescission and forfeiture is sought it has already been suggested that leave will at no time be required. Vendors will have to choose between asking for forfeiture and obtaining thereby a certain right to the amount of the deposit and the alternative course of claiming damages (which may well be very heavy: *Keck* v. *Faber* (1916), 50 S. J. 253), subject to the risk of leave to proceed being refused.

Leave to commence proceedings.

The cases in which leave is necessary before proceedings may be begun are few. By section 1 (2) (b) leave is necessary before any proceedings may be instituted for foreclosure or for sale in lieu of foreclosure. No leave is necessary for the presentation of a bankruptcy petition or a winding-up petition (section 1 (5)) (but the debtor may apply in the proceedings for a stay) except where they are based on a judgment, in which case the presentation is deemed to be an enforcement of the judgment and thus to require leave (1939 Act, s. 3 (b)).

"*Proceedings in lieu of forfeiture.*"

It is not quite clear what is included within the scope of "proceedings for foreclosure or in lieu of foreclosure". In the 1914 Act foreclosure alone was mentioned with disastrous results (*Re Farnol Eades, Irvine & Co.*, [1915] 1 Ch. 22) and it was also held that an equitable chargee required leave to enforce his security because there was a jurisdiction to enforce it by forclosure (*Hosack* v. *Robins*, [1917] 1 Ch. 332). But it has now been held that such a chargee has no right to foreclosure (*Daponte* v. *Schubert*, [1939] 1 Ch. 958); it is difficult therefore to see how any proceedings started by him can be regarded as being in lieu of something to which he is not entitled and it is submitted that proceedings by such a chargee for a judicial sale will not be affected by the Act.

Debenture holders' actions.

Difficulties which might have arisen in connection with debenture holders' actions have been avoided by treating them as falling within this section and therefore as requiring leave (*Re Corporate Equitable Property Society, Ltd.; Gardam* v. *The Society and Others*, [1940] 1 Ch. 654), the reason given being that foreclosure may be ordered in such proceedings. But other difficulties have very recently been opened up by the decision in *Re S. Brown & Son (General Warehousemen), Ltd.*, 56 T. L. R. 1000. In this case a debenture holders' receiver had been appointed with the leave of the Court under a clause in common form making any such receiver the agent of the company. After the appointment the company had gone into liquidation and the question for decision was whether leave was necessary under the Courts (Emergency Powers) Act, 1939, before the receiver could exercise the power of sale. The decision was made easy by the liquidation, for its effect was to determine the agency and to make the receiver the agent of the debenture holders (*Gosling* v. *Gaskell*, [1897] A. C. 575); leave was therefore necessary. But Bennett, J., felt very great doubt whether the position would not have been different if there had been no liquidation; for the receiver would then have been acting as agent for the company and no leave is required before an agent may realise on behalf of his principal.

Costs.

The third class of case—that in which leave is necessary to enforce a judgment or order—does not call for comment except as to the exceptions. It is well known that no leave is necessary for the enforcement of a judgment in tort or of a contract made after September 2, 1939, but it is not always remembered that the same applies to a judgment or order for nothing but costs (section 1 (1) (c)). It has been suggested in some legal periodicals that these words would extend to include a solicitor's judgment against his client for costs, but it is submitted that this is clearly a judgment on a contract the enforceability of which will therefore depend on the date of the retainer. No express provision is made for the case of a plaintiff who obtains a judgment in tort for damages *and costs* but it is probable that the costs are treated as "annexed or incident to and as partaking of the character of" the judgment (see Eve, J., in *Torres* v. *Torres*, [1917] 33 T. L. R. 547, and *Eteen* v. *Pollard*, 87 L. J. K. B. 356).

Contract made after September 2, 1939.

Where a contract is made after September 2, 1939, no leave is

required (section 1 (1) (b)). This creates a trap into which debtors have on occasion fallen and into which some creditors have deliberately attempted to lead them. If a claim on a pre-war contract is compromised it may be a difficult matter to determine whether there is a new obligation or merely a variation of the old. In *Page* v. *Skelt*, [1940] 1 K. B. 778, a King's Bench action on a pre-war contract had been settled on the terms that the defendant was to pay periodical instalments to the plaintiff but if any such instalment was in arrear the plaintiff might "sign judgment"—"an inaccurate expression", *per* Clauson, L.J.—for the balance outstanding and for this purpose might apply to the Judge for a Judge's order. The instalments were not paid, an application was properly made and judgment was drawn up. The Court of Appeal held that it was a judgment on the original contract and not a judgment on a new post-war contract constituted by the settlement.

It is submitted that the crux of this decision was the fact that the terms of settlement provided for judgment being entered on the original claim in the event of a default. Clauson, L.J., pointed out that the procedure in such settlements is different in King's Bench and in Chancery actions and it is clear that a compromise which novates the original bargain and substitutes a new obligation will take the whole matter out of the Act.

Where a bill of exchange or cheque is given after the war a new contract is thereby created to enforce which no leave is necessary; this was decided in Ireland during the Four Years War in *Provincial Bank of Ireland* v. *O'Donnell*, [1917] 2 Ir. R. 43, and Hallett, J., reached a similar decision in an unreported case in chambers at which the author was present.

So far as leases are concerned there is more uncertainty. A number of decisions are quoted in *Woodfall* (23rd ed.) on p. 278 to show that a mere variation in the amount of the rent does not create a new tenancy and it is thought therefore that unless there is a substantial variation of the terms of the tenancy or an entirely new agreement is entered into the tenant will still enjoy the protection of the Act. The advisers of both landlords and tenants will do well to bear this in mind.

A further protection extending even to contracts entered into after September 2, 1939, is now conferred upon persons who can show that they are directly or indirectly affected by the evacuation of an evacuation area, by the evacuation of any premises in pursuance of advice given by or on behalf of any government department or by any order under regulations 16A or 21 of the Defence (General) Regulations, 1939 and 1940, requiring the removal of animals from any area (Defence (Evacuated Areas)

Regulations (S. R. & O., 1940, No. 1209), under which have been made the Courts (Emergency Powers) (Evacuated Areas) Rules, 1940 (S. R. & O., 1940, No. 1421)). The Regulations are not well drawn. They apply only to contracts made *before* the date of the Regulations (July 10, 1940), but now that the whole of Great Britain is a defence area further protection is required for persons who are prevented from discharging contracts made after July 10, 1940, by evacuation or similar Orders.

"*Unable immediately to pay.*"

In the early days of the war practitioners had little experience of these cases and had very hazy notions of what was sufficient to entitle a debtor to the protection of the Act. So far as proceedings by a mortgagee for leave to exercise a remedy are concerned the principles which should actuate the Court were stated at length by Eve, J., in *Re Jobson's Application* (1918), 87 L. J. K. B. 251 (the rules there laid down are reproduced on p. 13 of the *Solicitors' Handbook of War Legislation*), but no similar guide was to be found for other cases. The first note of warning was sounded in *A* v. *B*, [1940] 1 K. B. 217, and in the humble opinion of the author that warning has been so interpreted as to constitute a grave and almost intolerable burden upon the debtor. Although the creditor may always apply for permission to cross-examine or may file affidavits in reply the practice to-day is, in effect, that the debtor must make a disclosure which is meticulous in the highest degree. In *Landau* v. *Huberman*, [1940] 2 All E. R. 66, the debt was a partnership debt and an affidavit was put which "was quite explicit, and the defendants show that the result of the war has been to diminish the sale very greatly. . . . But there are other matters upon which the defendants should satisfy the Court if they are to be given the privilege of having payment of their due debts postponed, or altered into payment by instalments. It is essential that they should give details of their private means and of their personal positions, and should show that their own private means are insufficient to make good the position of the business. They must also show that that is due to circumstances due to the war. In the only paragraph of the affidavit which deals with that matter the defendants say that all their partners are concerned in other businesses, and that the business of one of the other businesses has suffered in a similar manner to the way in which that carried on at the premises in question has suffered, and that they have no available resources out of which they can pay the plaintiff the amount claimed in this action. They do not produce a bank pass book, or any affidavit by an accountant who has investigated their private affairs and is

able to give the Court established information. We cannot consider the statement that they have not any available resources as in any way adequate or sufficient to discharge the duty of an applicant to the Court, and to enable the Court to deal out justice to the creditor and the debtor. Parliament did not provide that debtors should be preferred to creditors."

Debtors must, therefore, endeavour to deal in detail with every aspect of their financial position and it is not regarded as sufficient to make general statements and then to rely on the fact that the creditor could have applied for permission to cross-examine but did not do so.

The defendant must show first that he is unable immediately to discharge the judgment, and secondly, that that inability arises by reason of circumstances directly or indirectly attributable to the war (*A* v. *B*, [1940] 1 K. B. 217). With inability to pay we have already dealt. The word "immediately" was made the subject of an ingenious, but deservedly unsuccessful, argument in *Brandon* v. *Reidy*, [1940] 2 K. B. 194, where it was contended that the Act was only intended to afford a temporary protection to those debtors who, though unable immediately to discharge their obligation, had a reasonable prospect of being able to do so in the future and that where a debtor's position was such that there appeared to be no reasonable prospect of his ever being able to discharge his liabilities he was not entitled to protection. The Court of Appeal refused to accede to such an exceedingly harsh construction of the Act. But the debtor must also show that his inability arises out of circumstances connected with the war. In practice this has come to mean first, that he must show that he was solvent and able to discharge his liabilities in August, 1939, and, second, that as a result of the war he has since then become insolvent.

This sometimes works hardship, for although the war did not begin till September it had forerunners which acutely embarrassed many forms of trade. It is submitted also that to put so strict a construction upon the Act is wrong and that the fact that a debtor might have found difficulty in meeting all his liabilities immediately in August, 1939, does not necessarily deprive him of the right to say that his present inability is due to the war (cf. *Stirling* v. *Norton* (1915), 31 T. L. R. 293).

It is extremely common for the judgment creditor in proceedings under the Acts to point to the fact that at some time since the beginning of the war the debtor has been in a position to pay the judgment debt. This argument is based on a fallacy. The issue before the Court is not the same as in a judgment summons; it is

whether the debtor is unable to pay "by reason of circumstances directly or indirectly attributable to the war *at the time when the application to enforce the judgment is made*" (*Brandon* v. *Reidy*, [1940] 56 T. L. R. 658, *per* Goddard, L.J., at 659). The fact that the debtor has had funds available since the war or since the judgment was obtained may be evidence against him, for if he had given that money away or spent it it might be argued that his resulting inability to pay did not flow from the war at all but from his own acts. Where, however, he has used it to pay other pre-war debts no such point can arise and no complaint can properly be made on the ground of preference, for the jurisdiction of the Court is not akin to that in bankruptcy.

When judgment is given for damages and costs it is often proper to give leave to proceed limited to the former. Until the costs have been ascertained by taxation the debtor cannot properly speak to his ability to discharge them: *Skelt* v. *Norwich Benefit Building Society*, [1940] 1 All E. R. 245. It is on the same grounds that an application for leave to exercise in the future a remedy which has not yet become available ought to be refused (*Re Royal Bank of Scotland*, [1940] W. N. 281); and where leave is also necessary under some other statute it should be obtained first: *Re Huddersfield Building Society*, [1940] W. N. 247.

Onus on mortgagees.

As a result of the 1940 Act there is now one case where the onus of proof no longer rests upon the debtor. Those mortgagors who are serving in the armed forces of His Majesty other than the Home Guard are to be presumed to be unable to pay as a result of the war and the onus of proving either their ability to pay or that their inability is not due to the war is shifted to the mortgagee (section 3 (1)). Nor does this very proper protection cease there, for by sub-section (2) it is further provided that unless a mortgagor *both* appears *and* is represented he is also to be presumed to be so serving until the contrary is proved (section 3 (2)). The section is, however, limited to mortgages of dwelling-houses, of which expression there is no definition in the Act (it would appear to include any premises which are adapted and on occasions used for dwelling in even though part is used for purposes of trade or business (*Lewin* v. *George Newnes*, 90 L. T. 160; *Tomkins* v. *Rogers*, [1921] 2 K. B. 94); but it cannot include land or separate premises let together with a dwelling-house, for otherwise the provisions of the Rent, etc., Restrictions Acts, 1920—1939, would be unnecessary (see, *e.g.*, Rent, etc., Act, 1939, s. 3)).

"*The person liable.*"

It is not usually difficult to determine who is the person whose ability to discharge the obligation in question is material; but there are exceptions. Where the debtor is bankrupt is it the debtor or the trustee in bankruptcy who is "the person liable"? Morton, J., faced with this difficulty, thought that neither really answers the description but took the practical course of allowing the originating summons to be served on the trustee, thus treating him as the person to whom the section refers (*Re Abbey Road Building Society (Pomeroy's Trustee)*, [1940] W. N. 50).

Where there is a trust it is thought that the trustee is the only person whose position is material (though he will, of course, have his right of indemnity, for what it may be worth, against his *cestui que trust*). However, in the course of his judgment in *Soho Square Syndicate, Ltd.* v. *E. Pollard & Co.* (1940), 56 T. L. R. 764, Farwell, J., suggests that even if the consent of a debtor could remove the necessity for the leave of the Court it would not be sufficient to get the consent of a bare trustee where it was known that there were other persons beneficially entitled; and in *Re General London and Urban Properties, Ltd.*, [1940] W. N. 204, Morton, J., assumed for the purposes of his judgment that he might consider the position of the *cestui que trust*. He did not, however, decide that he was bound or even entitled to do this but merely said that even if he were able to do so he would still grant leave.

So far as applications for leave to enforce a judgment or order for the recovery of possession of land in default of non-payment of rent are concerned there is to be found in the 1940 Act, in section 5 (1), a specific direction to the Court that it is to consider only the ability to pay of the person "against whom the judgment or order was made and who is or would be, but for any forfeiture incurred in consequence of the default, entitled to the benefit of the lease under which the rent was reserved". The author confesses to great doubt as to the effect of this provision. Where the lessee holds as trustee for a *cestui que trust* can it be said that the trustee is entitled to the benefit of the lease, or is the result of the section that the *cestui que trust's* ability to pay becomes the material question? One result of the section is to make it clear that where there has been an assignment no account should be taken of the ability of the assignor to pay the arrears of rent, although he is of course liable for them to the lessor, but another is to leave it doubtful whether, in cases to which this section does not apply, the Court may consider the means of persons other than the debtor.

Substituted service is in proper cases permissible (rule 15) and the difficulties in which mortgagees might find themselves when it

is impossible to trace a mortgagor are in part met by new rules which permit the appointment of a receiver of the rents and profits of such properties on the *ex parte* application of the mortgagee (Courts (Emergency Powers) (Consolidation) Rules, 1940, rule 15B, made under the Courts (Emergency Powers) Act, 1940, s. 3 (3). The corresponding county court rule is rule 18B of the County Court (Emergency Powers) (Consolidation) Rules, 1940, which is in identical terms). Where the proper respondent is unknown it is now even permissible to issue an originating summons under this rule without naming any person as a respondent to it (rule 15B (3)).

Alien enemies.

In *Leader, Plunkett and Leader* v. *Direction Der Disconto* (1915), 31 T. L. R. 83, it was decided that the Acts of the Four Years War did not afford any protection to an alien enemy, but the rules made under the 1939 Act expressly dispense with service on enemies in certain cases and thus lead one irresistibly to the inference that they are to-day protected (see rule 15 (7) of the High Court Rules and rule 21 of the County Court Rules).

Representation of other creditors.

It has already been remarked that the Acts do not create a quasi-bankruptcy jurisdiction in the Court (*A* v. *B*, [1940] 1 K. B. 217), but it has also been said that they do require it to do a sort of distributive justice (*Brandon* v. *Reidy*, [1940] 2 K. B. 194). In the case last cited the Court of Appeal invited the Rule-making body to provide for the representation in suitable cases of creditors other than the actual creditor whose debt is before the Court. This has now been done (rule 15A of the High Court and 18A of the County Court (Emergency Powers) Rules) but it remains to be seen how it will work in practice.

Too free a use of it is to be discouraged and it is probable that the Courts would penalise the debtor who abused his rights. Indeed, in *Brandon* v. *Reidy* itself it was said *per curiam* : " We do not mean to suggest that in every case where a debtor asks for relief and says he owes money to A, B, C, D, E and F in addition to the plaintiff, that the whole of these people should be brought before the Court. But in a case such as this where there is this mortgage of the sub-lease and where the three people vitally interested in the matter are the mesne landlord, his tenant and mortgagees, it might well be that in a proper case the Court should be able to have the mortgagees before them. . . ." Some such provision was very necessary. The author has had much experience of businesses which, though badly hit by the war, have been bravely

carrying on with the full support of nine-tenths of the creditors but have been relentlessly pursued and eventually killed by a single creditor who puts his own selfish rights above those of his fellows. Another common injustice is that the creditor to get the first judgment invariably obtains an order far better than that granted to those who succeed him; in one instance the first creditor obtained an order for £7 a month and the second one for 5s. a month only. The reason being that there was nothing left after satisfying the first order.

There are several aspects of the new rules on this matter which call for comment. In the first place it should be observed that the other creditors have no right to appear unless they are brought to the Court by the debtor. Unless he gives the necessary notices they will receive no notice of the application, and, even if they learn of it, will have no right of audience. Secondly, if they are enabled to appear they may be heard upon the debtor's ability to pay and the order that should be made in the particular case before the Court, but they can obtain no order for the payment of their own debts and the Court is expressly forbidden to make the payment of any obligation other than actually in issue in the particular proceedings a condition for the suspension of leave to proceed (Courts (Emergency Powers) Act, 1940, s. 2). This is a serious disadvantage from every point of view. It exposes the unfortunate debtor to the costs of other applications and it prevents the Court from dealing with the matter as a whole. There have already been cases within the author's knowledge where one Master has refused leave and another has granted it although the debtor and the evidence were identical! It may be that a practical solution of these difficulties can be found in the issue by the other creditors of their own separate proceedings and the consolidation of those applications so that they are all heard together, but both for reason of time and otherwise it will often be difficult to arrange this.

Results of suspension of leave to proceed.

In order that one may judge properly of the exact effect in law of the Courts (Emergency Powers) Acts, 1939 and 1940, on legal rights and relationships it is necessary to appreciate that the 1939 Act in no case altered the rights of the parties, nor did it make any change in the legal consequences of failure to discharge an obligation when it fell due. Its operation was confined to suspending the creditor's rights whilst it left those rights themselves unaltered. It is true, in *Blanket* v. *Palmer* (*supra*) MacKinnon, L.J., said that the terms of the Act were so wide and vague that it might be within the power of the Court to order almost anything

in defiance of the contractual obligations of the parties, but this was *obiter* and it is respectfully submitted that the learned Lord Justice cannot have been referring to the rights themselves but only to the means by which they are enforced.

Some very anomalous results were thereby achieved. The lessor who obtained judgment for possession on the ground of non-payment of rent has effectively forfeited the lease (subject of course to the lessee's right to apply for relief) and the hire-purchase customer who has defaulted in his payments will usually be deprived by virtue of the terms of his contract of his right to complete the purchase on payment of the balance of the hire-purchase price. The suspension of the creditor's right to proceed to enforce his judgment in these cases did not in any way limit the effect of the judgments themselves.

In cases to which the Rent, etc., Restrictions Acts apply no great difficulty arises because it has been long accepted that they create a statutory tenancy when once the contractual tenancy is determined. No such effect could be given to the Courts (Emergency Powers) Act, 1939, so the 1940 Act contains provisions designed to protect those lessees whose leases are not within the Rent Restrictions Acts. So long as leave to proceed to enforce a judgment for possession on the ground of non-payment of rent is either refused or suspended subject to conditions the lease is to be deemed not to be forfeited and is to continue in force until the judgment or order becomes enforceable (Courts (Emergency Powers) Act, 1940, s. 1 (2)). This sub-section is limited to cases where the application for leave to proceed is heard after July 10, 1940 (section 1 (2)); where such an application had been dealt with before this date and leave had been either refused or suspended on conditions the lessee (strictly the person who would be entitled to the lease but for the forfeiture) may now apply for relief from forfeiture (section 1 (3)). In this latter case the relief is not automatic: an application to the Court is required and there will be many cases where no such application is made. As no change is made in the existing rights of lessee and sub-lessee to relief it would seem that an application may still be made under the Common Law Procedure Act, 1852, ss. 210—212, at any time up to *six months after execution* of the judgment. Relief under the latter Act is, however, confined to cases where the arrears of rent, interest and costs are paid to the lessor so that it will not always be politic to advise the lessee to rest content with his rights under this Act and not to take advantage of his newer privileges.

Provisions which are very similar in object though quite different in form are to be found in section 4 (2) for the protection of hire-

purchase customers. Notwithstanding that he has defaulted and that judgment for the return of the goods hired has been obtained, the hirer—as the customer is called—may still become the owner of the goods on payment of the full hire-purchase price. This privilege is very wisely drawn in a wide form; it is not confined to a payment made before leave is granted to the dealer but extends to a payment made at any time before possession is taken or the judgment or order is executed, thus affording the hirer an opportunity up to the last moment to save the goods from forfeiture. There is no relief in equity once such a forfeiture has taken place nor (apart from the limited protection of the Hire-Purchase Act, 1938) has the hirer any other right to relief (*Cramer* v. *Giles* (1883), Cab. & El. 151; *Sterne* v. *Beck* (1863), 1 De G. J. & Sm. 595).

Appeals.

During the Four Years War the Court of Appeal showed the strongest reluctance to entertain any appeal under the Act, resting their decisions on the words "the Court may in its *absolute discretion* . . . ." A slightly different form of words has been used in the 1939 Act and there have been several appeals, but the section of the 1940 Act which deals with mortgages revives the earlier expression and the result will probably be to bar appeals in such cases altogether (*sed quære* as to the effect of the decision in *Evans* v. *Bartlam*, [1937] A. C. 473).

AGRICULTURE AND THE EMERGENCY LEGISLATION.

By P. H. Thorold Rogers, Barrister-at-Law.

Having been asked by the editor of *The Conveyancer* to attempt the task of assessing and summarising for his readers the effect of the emergency legislation on the law relating to agriculture, I have embarked with trepidation upon the following article. The subject is one which is specialised to the last degree and, more than many others, it presents problems of practical administration and custom with which it is peculiarly difficult for one who is not in daily contact with them to deal adequately. My task is not made any easier by reason of the fact that much of the legislation relating to agriculture is administrative in character and of what is left the larger proportion is financial. Rightly or wrongly I have conceived that *The Conveyancer* is not an appropriate place for the discussion

of either of these two matters nor, it should be added, am I in any way qualified to deal with them.

I intend, therefore, in this article to confine myself to those aspects of the emergency legislation which affect law as the lawyer knows it and must apologise in advance for any omissions which my readers may consider unjustified. I have throughout used the word "farmer" to denote every kind of agriculturist.

War Damage.

First of the problems to be considered is that of war damage. It permits of sub-division into insurance, landlord and tenant, and compensation.

Insurance.

How far an express covenant to insure buildings against war risks is affected by the present inability to obtain any cover of this nature is a matter of doubt which has been discussed in earlier numbers of *The Conveyancer* (see Vol. 4, No. 3, pp. 234 *et seq.*, and *Moorgate Estates, Ltd.* v. *Trower*, [1940] 1 Ch. 206), but where the covenant does not expressly embrace war risks it is thought to be clear that it will not extend by implication to include risks which are not within the policy of the sort that the parties had in mind (*Upjohn* v. *Hitchens*, [1913] 2 K. B. 48). If the farmer is a bailee of chattels his rights will depend upon the law relating to bailments which has also been discussed earlier (Vol. 4, No. 4, pp. 348 *et seq.*).

In almost every case he is also relieved from the necessity of compulsory insurance under the War Risks Insurance Act, 1939. This Act, as amended by S. R. & O., 1940, No. 771 on May 23, 1940, authorised the imposition of compulsory insurance against war risks of all persons carrying on business as sellers or suppliers of goods, and by the War Risks (Compulsory Insurance of Commodities) 1940 (S. R. & O., 1940, No. 785), such a scheme was made obligatory wherever the goods owned for the purposes of the business exceed £1,000 (the scheme had previously applied to *sellers* of goods only). The farmer is not, as such, excluded from the compulsory scheme (indeed the Act itself provides that agricultural products and livestock shall be deemed to be goods insurable under the Act unless excepted therefrom by Order), but the result of the War Risks Insurance (General Exceptions) Order, 1940 (S. R. & O., 1940, No. 294), is to render uninsurable the very goods which the farmer is likely to have for supply or sale. This Order provides that amongst the goods which shall not be insurable under the compulsory scheme shall be included :—

" growing crops, plants and trees; livestock; and, in relation to a person carrying on the business of producing agricultural products, the following goods produced by that person when on land occupied by him in the course of that business, that is to say, agricultural products and articles of food and drink wholly or partly manufactured or derived from any such product and fleeces and the skins of animals.

" Timber, floating, and timber on the site when felled."

Neither livestock nor agricultural products are defined in the Order, but they are defined in the War Risks Insurance Act, 1939, s. 15 (1) as follows :—

" ' agricultural products ' means products of agriculture, horticulture or silviculture, and includes growing crops, plants and trees;

" ' livestock ' includes animals of any description ".

When it is remembered that it is only goods owned for sale or supply that are ever within the scheme it will be apparent that the farmer will rarely have to concern himself with war risks insurance.

Where war damage is suffered by chattels there is no legal remedy or redress. Compensation may in some cases be payable by the authorities but there is no legal right to demand it; similarly compensation for personal injuries may be paid under the Personal Injuries Act, 1939, but no legal enforceable claim can arise.

Landlord and Tenant.

Where, however, land or buildings suffer war damage and the occupier is a tenant he should have regard to the Landlord and Tenant (War Damage) Act, 1939. As will be remembered this Act contains very detailed and complicated machinery for adjusting the rights of landlord and tenant in the event of war damage; but agricultural leases are specially dealt with in a much more direct and simple manner.

An agricultural lease for the purposes of the Act is defined as meaning a lease the land comprised wherein consists wholly or mainly of agricultural land or agricultural buildings within the meaning of the Rating and Valuation (Apportionment) Act, 1928. Referring to the latter Act we find that agricultural land is there defined as :—

" any land used as arable meadow or pasture ground only, land used for a plantation or a wood or for the growth of saleable underwood, land exceeding one quarter of an acre used for the purpose of poultry farming, cottage gardens exceeding one quarter of an acre, market gardens, nursery grounds,

> orchards or allotments, including allotments within the meaning of the Allotments Act, 1922, but does not include land occupied together with a house as a park, gardens (other than as aforesaid), pleasure grounds, or land kept or preserved mainly or exclusively for purposes of sport or recreation, or land used as a racecourse; and, for the purposes of this definition the expression 'cottage garden' means a garden attached to a house occupied as a dwelling by a person of the labouring classes".

The definition of "agricultural building" is :—

> "buildings (other than dwelling houses) occupied together with agricultural land or being or forming part of a market garden, and in either case used solely in connection with agricultural operations thereon".

Damage to land, crops, animals or chattels is not within the Act. But—

> "Where any buildings or works comprised in an agricultural lease . . . (whether made before or after the commencement of this Act) are unfit by reason of war damage, the court may, on the application of the tenant, either determine the lease or modify the terms thereof, whether by reducing the rent payable thereunder or otherwise, according as appears just having regard to all the circumstances of the case".

Before he can invoke the protection of this section the tenant must show that the buildings or works are "unfit" by reason of "war damage". Both these phrases are defined: "unfit" in relation to an agricultural lease means "unfit for any purpose for which the tenant can be reasonably expected to use the land, having regard to the terms of the lease under which it is held", and "war damage" means "damage caused by, or in repelling, enemy action, or by measures taken to avoid the spreading of the consequences of damage caused by, or in repelling, enemy action" (the limitations of this definition have been discussed in an earlier number of *The Conveyancer* (Vol. 4, No. 3, pp. 234–5)).

Defensive works carried out by the armed forces can easily be brought within the definition of war damage, for they are undertaken to repel enemy action, yet in respect of these the tenant will be entitled to compensation under the Compensation (Defence) Act, 1939, s. 3, such compensation being assessed at the amount by which the annual value of the land is diminished by reason of the doing of the work. Where such works result in damage to "buildings or works" it would not be just for the tenant to get the benefit of a variation of his agreement in addition to his compensation.

Encouragement of Food Production.

By far the greater part of the emergency legislation dealing with agriculture is concerned with stimulating farming and the production of food for man and beast.

The many marketing schemes of peace-time have been largely shelved and the restrictions apparently withdrawn, only to be replaced by the more absolute despotism of control and price-fixing orders. These schemes are of too specialised a nature for discussion here and it must suffice to say that the Milk Marketing, Milk Products and Potato Marketing Schemes have been curtailed and there have been amendments to the Bacon, Herring, Livestock, and Sea Fish Industry Acts and to the Improvement of Live Stock (Licensing of Bulls) Act, 1931 (see the Defence (Agriculture and Fisheries) Regulations, 1939). The objects of the amendments has been to remove restrictions and to simplify supply.

With the same object the Agriculture (Miscellaneous War Provisions) Act, 1940, has made a number of alterations to the Agriculture Development Act, 1939, increasing the quota payments for wheat, amending the oats subsidy, extending it to rye, and amending the barley subsidy. These amendments are financial in nature and, taken broadly, are designed to remove restrictions and increase the circumstances in which a claim may be made. The same Act extended the right to the " ploughing up " grant of £2 an acre.

Good Husbandry.

Wide powers have been conferred upon the Minister of Agriculture with the object of enabling him to secure that every acre of land is cultivated to its best advantage. Before these powers are examined in detail it is desirable to note that they will usually be exercised, not by the Minister himself, but by the War Agricultural Executive Committees which, as in the last war, have been set up for each county (difficulties at first experienced in county boroughs have been met by the appointment of sub-committees under S. R. & O., 1939, No. 1079).

The Minister's power to delegate his powers to these bodies (*inter alios*) will be found in regulation 66 of the Defence (General) Regulations which, as amended by S. R. & O., 1939, No. 1786, on December 2, 1939, authorises the delegation of his powers under regulations 61, 62, 63, 64 and 65. The regulation which deals with requisitioning possession of land is regulation 51. This is not included in this list, but the reason for this is that it contains in itself an authority for delegation which we shall see later has

been exercised both in favour of the War Agricultural Executive Committees and of certain local authorities.

The most important regulations are regulations 61 and 62. The former empowers the Minister to prohibit the use for any purpose other than agriculture of land which was agricultural at the time when his order is made. The definition of "agricultural land" is identical with that quoted above on p. 26, save that by S. R. & O., 1939, No. 1317, it is to be deemed for the purposes of this regulation (regulation 61) to include any land used as allotments or allotment gardens, phrases which are not themselves defined in the regulations or order, but must doubtless have the meanings assigned in the Allotments Act, 1922. The orders made under this regulation may be general or particular, but only the Minister himself may make them as he has not yet exercised his authority to delegate his powers under this regulation. No general orders have as yet been issued.

The same regulation (regulation 61) also contains provisions altering the common law and making it an offence to trespass on agricultural land as defined above; but this provision is qualified by a proviso to the effect that a prosecution shall only lie if "at the material time notices warning trespassers of their liability under this paragraph were posted on or near the boundary of the land in question, so as to be easily seen and read by members of the public" (regulation 61 (2), proviso). This ill-drafted clause presents many attractive problems. In the first place it is submitted that a notice which says no more than that "trespassers will be prosecuted" will not suffice to comply with the regulation, for it does not warn the public of their liability *under this paragraph*; secondly, what of the land which has a lengthy boundary to the highway or several different boundaries to different highways? Will one notice on one boundary suffice or must there be one notice on each boundary —or perhaps several notices? Lastly, what of the farmer whose land is approached by a trespasser over the land of a neighbour? No notice put up by the former at or near his boundary will be seen by the public and it would seem to be questionable whether a notice put up anywhere else would suffice.

Control of Cultivation.

As part of his powers to compel good husbandry the Minister is authorised by regulation 62 of the Defence (General) Regulations as amended on April 17, 1940, by S. R. & O., 1940, No. 563, to "give such directions with respect to the cultivation, management or use of agricultural land as he thinks necessary or expedient for the purpose of increasing or maintaining the production in the United Kingdom of articles essential to the life of the community".

For the purposes of this regulation the standard definition of agricultural land is extended. Normally it does not include parks, sports grounds or race-courses; but by S. R. & O., 1940, No. 1016, the regulation was amended so as to extend equally to these three classes of non-agricultural land.

Full use has been made of the power of delegation and these powers may be exercised by the War Agricultural Executive Committees (the Cultivation of Lands Order, 1939, S. R. & O., 1939, No. 1078); it is on this authority that the ploughing up orders which have been so widely made by these Committees must rest—and it may here be remarked in parentheses that such an order does not, and apparently cannot, compel the ploughing up of a public footpath (*Dennis* v. *Good*, 35 T. L. R. 93).

Failure to comply with such directions is an offence against the regulations, but it also justifies the Minister or Committee in terminating the tenancy by serving a notice to this effect on tenant and landlord respectively (regulation 61 (1A)).

The tenancy may also be determined by the same persons and in the same manner under regulation 62 (2) if it appears that the tenant is not cultivating the holding in question in accordance with the rules of good husbandry (*a*), but in this case the power is only exercisable in respect of an agricultural holding as defined in section 57 of the Agricultural Holdings Act, 1923.

It is submitted that inadequate thought has been given to the legal problems produced by the exercise of this power. When such a notice of termination is served the tenant ceases to be the tenant of the landlord and becomes a trespasser, but only the landlord may recover possession and any proceedings to do so must be in his name. It would seem, however, that a direction to bring such proceedings would be a direction as to the management of the land and, as such, one which the Minister may properly give to the landlord under regulation 61 (1); but there is no statutory or other provision for the payment of such costs as the landlord is unable to obtain from the ex-tenant nor for the indemnification of any other consequential loss (though it is possible that a petition of right might lie in certain circumstances (see *War Legislation*, p. 707)).

The landlord who is thus summarily deprived of his tenant will be concerned to discover his legal position and rights. So far as the Agricultural Holdings Act, 1923, is concerned, the tenancy is deemed to have been determined, but not by the landlord. Claims

(*a*) As defined in Agricultural Holdings Act, 1923, s. 57 (1). The definition is too long to be reproduced here and it does not depart from the natural meaning of the phrase.

for improvements may still be made by the tenant and, on the other hand, the landlord retains his rights to compensation for deterioration; but sections 12 to 14, which entitle the tenant to compensation, in certain circumstances, for disturbance are excluded (regulation 62 (3)). No further rent can, of course, be claimed, but the landlord will remain free to find a new tenant and make such agreement with him as he can (unless it can be said that the Minister may direct him to accept a particular tenant and may treat this direction as one relating to the management of the land under regulation 61).

This latter fact is important and is not always understood; after regulation 62 had been made it was amended by the insertion of a new paragraph 3A (S. R. & O., 1939, No. 1469) which in cases where the Minister or any person acting under his authority is in possession of agricultural land, authorises him or them to make contracts for the occupation of the land. This power is peculiar. It arises only where the Minister or his delegates are in possession under the regulations—*i.e.*, when they have requisitioned possession under regulation 51, for they do not obtain possession by determining the tenancy in the circumstances described above, and when exercised it has the effect of constituting the Minister or his agent the landlord and the other party his tenant (regulation 62 (3A)). The freeholder in such a case will have a claim for compensation under the Compensation (Defence) Act, 1939, s. 2, for what it is worth, but he will have no contractual rights against the tenant at all. The Agriculture (Miscellaneous War Provisions) Act, 1940, s. 23, goes even further; this Act provides that where the Minister of the Agricultural Committee has taken possession of land for agricultural purposes (*i.e.*, under regulation 51) *and* the Minister certifies that it was not being cultivated, or was not being cultivated according to the rules of good husbandry, he or they may remain in possession of the land not only for the period of the Defence (Emergency Powers) Act, 1939 (at present two years from September 2, 1939 (Defence (Emergency Powers) Act, 1940), but subject to extension by resolution of both Houses of Parliament) but for a further three years after the close of that period and, further, instead of remaining in personal possession the Minister or Committee may make contracts for the occupation of that land for the whole of such period.

The landowner cursed with a bad tenant may, therefore, find himself dispossessed for the period of the war and a further three years thereafter, at the end of which time he will be faced with an obligation under section 23 (5) to pay to the Minister a sum equal to the enhanced value of the land!

Control Orders.

In the Defence (General) Regulations, 1939 and 1940, will be found regulations authorising (i) the killing of game and pests (regulation 63, as substituted for the original regulation by S. R. & O., 1940, No. 382) under which have been made orders dealing with the destruction of rabbits, rooks, deer, woodpigeons and rats, (ii) the control of fisheries (regulation 64), (iii) of fishing rights (regulation 65), and (iv) of the felling and sale of trees (regulation 68), and in regulation 62B will be found a general licence to all persons to keep pigs, hens or rabbits and to build styes, hutches, etc., notwithstanding any restrictive covenant or contract to the contrary, but subject to the qualification that nothing must be done which constitutes a nuisance or is prejudicial to health (this should not be confused with the power now vested in the authorities to permit nuisances in certain circumstances where the national effort makes it desirable (regulation 54A, S. R. & O., 1940, No. 697)). The hatching and rearing by artificial means of pheasants is now prohibited except under licence (Rearing of Pheasants (Prohibition) Order, 1940, S. R. & O., 1940, No. 1128), the close seasons for pheasants and grouse closed on September 1 and August 5 respectively and game may be killed or taken on Sundays and Christmas Day despite the Game Act, 1831 (Defence (Game) Regulations, 1940, S. R. & O., 1940, No. 1380).

Lastly, before leaving this branch of the subject, attention should be directed to the Horticultural (Cropping) Order, 1940 (S. R. & O., 1940, No. 632) which restricts the acreage of a number of luxury and semi-luxury products such as soft-fruit, seakale, flowers and bulbs, herbs and mint and mushrooms in glass-houses. The permitted percentage, which in no case exceeds, and in most cases is substantially less than, the amount grown in 1939, must not be exceeded except with the permission of the Agricultural Committee, but a direction given before the date of the Order (May 2, 1940) constitutes such consent.

Returns.

The farmer was already at the outbreak of war liable to be called on to make returns under the Agricultural Returns Act, 1925; but section 2 of that Act imposed duties of secrecy upon the Minister. The scope of these liabilities is now extended to include poultry breeding and keeping and the Minister is, as during the Four Years War, relieved from the condition of secrecy (regulation 67)—this regulation has been exercised in the Agricultural Returns Order, 1939 (S. R. & O., 1939, No. 1439) which entitles the Minister to

call for any estimate, return or information and authorises his agents to enter and inspect premises with a view to securing compliance.

Requisitions and Work on Land.

Agricultural land, in common with all other land, may be requisitioned by the "competent authorities", which for our purpose are the Minister of Agriculture and such persons as he may delegate his powers to (regulation 51). Once in possession the Minister of the Agricultural Committee may authorise any person to use the land for any purpose (regulation 51 (2) as amended by S. R. & O., 1940, No. 828) or they may make contracts for its occupation under the powers discussed above.

In either case, as also where "work" is done on land under regulation 50, the owner or occupier (the rights vary according to the circumstances) may claim compensation under the Compensation (Defence) Act, 1939. The armed forces of the Crown also possess special powers to "use" land under regulation 52, but in this case no express provision is made for compensation (see *War Legislation*, p. 629). These powers are too general to call for discussion here, but one aspect of them does justify a more detailed consideration.

The Cultivation of Lands (Allotments) Order, 1939 (S. R. & O., 1939, No. 1316) has been made under regulation 51 authorising local authorities—not in this case the Agricultural Committees—to requisition land for use as allotments. This order should not be confused with regulation 62A which authorises local authorities to let land of which they are already in possession for use as allotments.

The Council's powers under the former Order are very restricted and the Order has given rise to much misunderstanding. Gardens, pleasure grounds and commons may not be taken without the consent of the Minister and occupied land may not be taken without the *written consent of the occupier* and there are also limitations on the use to which the land may be put (*e.g.*, only annual crops may be grown). But the confusion to which this Order has given rise is in connection with compensation. Paragraph 4 of the Order authorises the Council concerned to agree with the occupier *in the case of occupied land* a rent calculated in accordance with the principles of the Compensation (Defence) Act, 1939. Some councils have erroneously construed this as meaning that they can force the occupier to take less than the Compensation (Defence) Act rate—a contention which is obviously unsound if only because the order must surely be regarded as enabling and not mandatory—and still more have argued that because their power to agree such a rent

is confined to occupied land the owner of unoccupied land is not entitled to any compensation at all. This, it is submitted, is also wrong. In such a case the Council cannot agree the amount under the Order but the owner is entitled to put forward a claim under the Compensation (Defence) Act and to be paid a rent calculated in accordance with it though his claim is, it is thought, not against the Council but against the Treasury through the Minister of Agriculture.

Employment.

It has become illegal to employ any agricultural contractor who is not registered with the Agricultural Committee for the county in which the work is to be done and such contractors are required not only to register themselves but to comply with all directions which the Committee may give them (Registration and Control of Agricultural Contractors Order, 1940, S. R. & O., 1940, No. 1333 (July 17, 1940)).

There have also been amendments to the rules relating to the payment of minimum wages to agricultural workers designed to deal with the novice; and it is perhaps pertinent to observe here that restrictions on the employment of unemployed agricultural workers have been imposed with the object of bringing them back to the land (Undertakings (Restrictions on Engagement) Order, 1940, S. R. & O., 1940, No. 877). This regulation does not affect the employer who desires to employ such persons for agricultural purposes.

Courts (Emergency Powers) Acts.

The farmer is, like every one else, entitled in a proper case to rely on the protection of these Acts; he may also invoke the further protection of the Courts (Evacuated Areas) Order, 1940, where he is affected by the evacuation of an evacuation area or by a direction to remove animals from any place or district under regulations 16A or 21 of the Defence (General) Regulations, 1939 and 1940 (Defence (Evacuated Areas) Regulations, 1940, reg. 6).

ON FIXING THE STANDARD RENT OF NEW PREMISES FOR THE PURPOSES OF THE RENT RESTRICTIONS ACTS.

By B. A. Bicknell, Barrister-at-Law.

Where property within the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, was let on September 1, 1939, or had been let before that day, the standard rent for the purposes of the Acts is fixed and the rent can only be increased in the manner laid down by the Acts. The position is different in a case of a new house which has never been let. Such a house as yet has no standard rent. Section 12 (1) (a) of the Act of 1920, which is applied to new houses by the First Schedule to the Act of 1939, provides that such rent shall be the rent at which it was first let.

These provisions have presented some owners of new and, as yet, unlet house property with a very difficult problem. In many cases it is not now possible, owing to the situation of the premises or other war-time conditions, to obtain the full ordinary peace-time rent. In these circumstances landlords are naturally most unwilling to let the premises at a very low rent, if such rent is to become the standard rent under the Acts. At the same time it is a great loss to allow the property to remain empty indefinitely in the hope that, when peace comes, it will be possible to get the full rent. The question, therefore, is how can the property be let at a war-time rent without such rent becoming the standard rent binding on the landlord in what he hopes will be the piping days of peace.

In considering this matter the first thing to be observed is that the policy of the Acts is not to fix low rents in the first instance, but to prevent the rent once agreed being subsequently raised. There is no provision which requires the rent of new premises to be proportionate or in some way related to the annual value for income tax or rating purposes. The Acts leave the owner of a new dwelling-house free to get as high a rent as he can. Therefore, in considering this question one is not hampered by any statutory requirement that new rents shall conform to some standard of equity or reasonableness having regard to the circumstances existing at the date of the letting.

It seems that the Rent Restrictions Acts provide expressly or by implication two ways in which the landlord's difficulties may be

surmounted. The rent may, on the one hand, be fixed at a low figure, with provisions for raising it, or it may be fixed high with provision for decreasing it. In order to understand the position it is necessary to consider section 12 (1) (a) of the Act of 1920 as applied to later controlled houses by the Act of 1939, as this is the section which lays down what is the standard rent. This section provides : " (a) The expression ' standard rent ' means the rent at which the dwelling-house was let on the third day of August nineteen hundred and fourteen," [or in the case of a house brought under control by the 1939 Act, September 1, 1939] " or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house which was first let after the said third day of August " [September 1, 1939], " the rent at which it was first let :

" Provided that, in the case of any dwelling-house let at a progressive rent payable under a tenancy agreement or lease, the maximum rent payable under such tenancy agreement or lease shall be the standard rent; and, where at the date by reference to which the standard rent is calculated, the rent was less than the rateable value, the rateable value at that date shall be the standard rent."

The first method of preventing a war-time rent becoming the standard rent is by having recourse to the proviso to section 12 (1) (a) which makes it clear that it is possible to provide in a first lease of premises within the Rent Restrictions Acts that the rent shall go up, provided that the rent is raised in such a manner that it is a " progressive rent " within the sub-section. The Act contains no definition of the term " progressive rent ", which appears for the first time in the Act. The meaning of the words was considered by the Court of Appeal in *Wheeler* v. *Wirral Estates, Ltd.*, [1935] 1 K. B. 300, where Lord Wright said : " The words of the Act make it clear, as I think, that what is meant is a rent under one single tenancy and a rent which automatically rises during the continuance of that tenancy ". It seems that there must be a periodical increase and that one increase, such as a higher rent payable in the last year of the tenancy, would not be within the sub-section : *Goldsmith* v. *Orr*, [1920] W. N. 250. It would also appear that the rent is not progressive if the premises are let for a term with an option to renew from time to time at a higher rent.

The proviso to this sub-section offers an obvious and safe method of fixing the standard rent at a reasonable figure notwithstanding that the rent immediately payable is below that which is expected to be obtained in peace-time. There appears to be no objection to such a lease containing power for the tenant to determine before

the maximum rent is reached. Such a power should usually be inserted, as it is not possible at the moment to foresee when normal conditions will return, and many tenants will not wish to undertake to pay a steadily increasing rent for a substantial period without there being power to escape from the liabilities of the lease should circumstances so develop that the progressive rent becomes too onerous.

In the case of short tenancy agreements it is not possible within the period of the agreement to provide for a progressive rent to reach a proper figure. In this case the proviso to section 12 (1) (a) is of no assistance. A high rent must be the first rent made payable, with a subsequent reduction to a war-time rent so that a high rent is the rent at which the premises were first let within the first part of paragraph (a) of sub-section (1). The difficulty here is that if the transaction is not effected with some care, it may be said that the first-named rent, that is the full rent, was never in fact the rent but was merely colourable, and the lower is the true rent. It is clear that in such a case the higher rent must be reasonable, having regard to the peace-time value of the property. If a fantastic rent were fixed, out of all proportion to the real value of the property, it could almost certainly be challenged, as not being in fact the rent at all but merely a device for taking the property out of the Acts.

In the case of short tenancies, such as weekly or monthly tenancies, the best plan, where this is possible, is to let the premises at a reasonable peace-time rent in the first instance and subsequently reduce it to such a figure as is obtainable in war-time. Such a tenancy agreement need contain no mention of the intended reduction at all. At the end of the first rent period a new tenancy can be entered into at a lower rent. The drawback to this method is that few tenants will be prepared to incur the cost of moving into premises on the basis of an agreement which requires the payment of a higher rent than they can afford, on an honourable understanding that it will subsequently be reduced. If the honourable understanding takes on a legal character, the Court may later hold that the lower rent was really the true rent, the higher being merely colourable to defeat the Act. In many cases, therefore, the bargain will have to be set out in the original lease. Where a lease is necessary its terms must be such that it is clear that the original rent is in truth the rent at which the premises are first let within section 12 (1) (a). Two methods, which should be successful, of doing this suggest themselves : First, the rent can be fixed and the landlord may agree to accept a lesser rent in certain specified circumstances, but only in these circumstances. The

obvious example of such a lease is a letting to a man who is about to be engaged on war service. In such a case the original rent could not be questioned, if the landlord agreed to a reduction during the period of military service.

Where the character of the tenant does not, on the face of it, provide a reason for reducing the rent, it has been suggested that the reduction might be for the duration of the war. The objection to this course is that the tenant may allege that the reduced rent is really the true rent. Here it seems that there should be a lease at the full rent, with power for the tenant to determine such lease at the end of a short period. In the event of such determination he should be given an option to take a further term at a reduced rent. If the option is to take a lease on slightly less favourable terms, for example if the landlord, in case the option is exercised, is given power to determine the new lease in his turn at six months' notice, it would seem that the tenant will not be able subsequently to contend that the reduced rent is the standard rent.

As the Rent Restrictions Acts do not require the first rent of new premises to be fixed on some equitable basis, any device in a first letting which enables a landlord to fix a proper rent, to become the standard rent, is morally unobjectionable. As yet there have been no judicial decisions on the relevant portions of section 12 (1) (a) so it is not possible to foretell how the Courts will construe the section. It would seem that the landlord will be protected if he can establish that there was in fact an actual first letting at the higher rent, but there must be such a letting. The fact that it was only for a short period is not material, unless the period is so short that it could be said there was in fact no letting at the higher rent at all. We publish this month (*post*, p. 329) two forms which are intended as suggestions to meet landlords' difficulties and which should enable them to let premises to-day for what they can get, while fixing the standard rent at a figure which it is hoped in peace-time will be the rent actually then obtainable.

THE FINANCE ACT, 1938, PART IV INCOME TAX (SETTLEMENTS).

By Leonard Stein, Barrister-at-Law.

Part IV of the Finance Act, 1938, contains a series of elaborate provisions directed against avoidance of income tax (and, in particular, surtax) by means of settlements of certain types. It has been suggested that a summary of these provisions might be useful to those concerned with the framing of settlements by reminding them of some of the pitfalls to be avoided. It should be clearly understood that what follows does not purport to be an exhaustive discussion of Part IV of the 1938 Act. The purpose of this article is not to analyse Part IV in detail, but only to provide an outline of its main provisions.

It will be as well to begin by referring to an earlier attempt to check tax avoidance through the medium of settlements—that contained in section 20 of the Finance Act, 1922. It will be remembered that sub-section (1) of section 20 of the 1922 Act deals with settlements (or to use the terminology of the Act—"dispositions") of three distinct types. Paragraph (a) is concerned, broadly speaking, with revocable dispositions of income, paragraph (b) with dispositions of income for a period which cannot exceed six years, and paragraph (c) with dispositions of income for the benefit of a child of the disponor. Paragraph (a) has now become obsolete by virtue of section 41 (2) of the Finance Act, 1938, and has been replaced by the more comprehensive provisions of Part IV of the 1938 Act. Paragraph (c) has likewise become obsolete by virtue of section 21 (11) of the Finance Act, 1936, and has been replaced by the more comprehensive provisions of that section. Paragraph (b), however, still remains in force, so that a settlement will be caught by the anti-tax avoidance legislation, if, notwithstanding that it is outside the scope both of section 21 of the 1936 Act and Part IV of the 1938 Act, it amounts to a disposition of income for a period which cannot exceed six years. Thus, in the framing of a settlement the provisions to be considered, so far as income tax is concerned, are those of section 20 (1) (b) of the Finance Act, 1922, Part IV of the Finance Act, 1938, and in the case of children's settlements, section 21 of the Finance Act, 1936.

Part IV of the 1938 Act deals with :—

(1) Revocable covenants for annual payments (section 38 (1)).

(2) Revocable settlements of property (section 38 (2)).

(3) Settlements under which income may be accumulated (section 38 (3) and (4) and section 39).

(4) Settlements under which capital payments, by way of loan or otherwise, may be made to the settlor (section 40).

Before these topics are discussed *seriatim*, something must be said as to the meaning of the expressions " settlement ", " settlor ", and " income arising under a settlement ", as defined in section 41 of the 1938 Act. The settlements with which Part IV of the Act is concerned are not confined to settlements in the ordinary sense of the term. For the purposes of Part IV, " the expression ' settlement ' includes any disposition, trust, covenant, agreement or arrangement ". This definition has not yet been judicially considered in any reported case, but a similar definition of " settlement " in section 21 (9) (b) of the Finance Act, 1936, was considered in *Copeman* v. *Coleman*, [1939] 2 K. B. 484. The judgment in that case suggests that, in deciding whether a transaction which is clearly not a settlement in the ordinary sense of the term is caught by the wide words of the definition, the test to be applied is whether it was a *bona fide* commercial transaction.

" Settlor " is defined in section 41 (4) of the 1938 Act as meaning " any person by whom the settlement was made ", and " a person shall be deemed to have made a settlement if he has made or entered into the settlement directly or indirectly, and in particular . . . if he has provided, or undertaken to provide, funds directly or indirectly for the purpose of the settlement, or has made with any other person a reciprocal arrangement for that other person to make or enter into the settlement ". The application of the words " directly or indirectly " is illustrated by *Copeman* v. *Coleman*, above, where, in the light of a similar definition of " settlor " in section 21 (9) (c) of the 1936 Act, it was held that an individual was none the less a " settlor " in relation to certain transactions because they had been carried out through the medium of a company under his control.

As to " income arising under a settlement ", the main point to be noted is that, by reason of the definition in section 41 (4) of the 1938 Act, this includes, not only income actually received, but also notional income arising to the trustees of a settlement, or a beneficiary thereunder, as a result of a direction and apportionment under section 21 of the Finance Act, 1922, and the supplementary

enactments forming part of the companies surtax legislation. Let it be supposed, for example, that the trustees of a settlement hold shares in a privately controlled company on trust to pay the income to a certain beneficiary; that a direction has been made under the companies surtax legislation; and that the income has been apportioned to the beneficiary. For the purposes of Part IV of the 1938 Act, the income so apportioned to the beneficiary will fall to be treated as income arising under the settlement. Thus, where a settlement is caught by Part IV, the income to be treated as the income of the settlor may, in certain circumstances, include, not only income actually arising under the settlement, but notional income of the nature just described. The privately controlled company may have been incorporated outside the United Kingdom, in which case it will not be within the scope of the companies surtax legislation. With a view to stopping this loop-hole, section 41 (4) (ii) of the 1938 Act provides that the income arising under a settlement is to be taken to include, not only income which has in fact been apportioned, by virtue of the companies surtax legislation, to the trustees of the settlement or a beneficiary thereunder, but also income which could have been so apportioned if the company had been incorporated in the United Kingdom. Notional income deemed to arise under a settlement as a result of a direction and apportionment under the companies surtax legislation must, of necessity, be undistributed income, since there can be no distribution of income not in fact received. Hence, the inclusion of such notional income in the income arising under a settlement is, as will be seen, of special importance in relation to these provisions of Part IV of the Act which are concerned with undistributed income.

We may now turn to section 38 of the Act, beginning with sub-section (1), which deals with revocable covenants for annual payments. Where annual payments are covenanted to be made under a settlement, sub-section (1) will apply if the terms of the settlement are such that the liability to make the payments can be determined by the exercise of a power of revocation or other power vested either in the settlor or in some other person. It will make no difference that the person in whom the power is vested can exercise it only with the consent of some other person. The power need not be a power of revocation in the ordinary sense of the term. Section 38 (1) will apply, for example, where X covenants to make annual payments to Y, Ltd., until the making of an order or the passing of a resolution for the winding up of the company, the company being in fact controlled by X, who has power to cause a winding-up resolution to be passed: see *C. I. R.*

v. *Payne* (1940), T. R. 367. Where a settlement is caught by sub-section (1), the annual payments will be treated, for tax purposes, as the income of the settlor and not as the income of any other person; in other words, they will not be deductible by the settlor in the computation of his total income for surtax purposes, nor will the recipient be entitled to treat them as his income for the purposes of a repayment claim.

Subject to the limitation about to be mentioned, sub-section (1) applies, not only where the power can be exercised forthwith, but also where it will or may become exercisable at some time in the future. To this, however, there is a qualifying proviso, which applies, and applies only, where two conditions are satisfied. First, the power must not be exercisable " within the period of six years from the time when the first of the annual payments . . . becomes payable ". It is to be noted that the starting-point is not the date of the settlement, but the due date of the first payment. Secondly, the proviso will not apply unless " the like annual payments are payable in each year throughout that period ", *i.e.*, the six years' period mentioned above. It seems safe to assume that the words " the like annual payments " will be satisfied by a series of payments which, though not necessarily uniform in amount, are calculated by reference to a uniform measure, so that it contains such a " constant element " as is mentioned in *D'Ambrumenil* v. *C. I. R.*, [1940] 1 K. B. 850, *per* Wrottesley, J., at p. 856. If these two conditions are satisfied, then the annual payments will not be caught by section 38 (1) so long as the power cannot be exercised. Let it be supposed, for example, that there is a settlement by which X covenants to make annual payments of £—— a year for seven years, the first payment to be made on (say) January 1, 1941, and subsequent payments to be made at annual intervals thereafter. X has no power of revocation, but by the terms of the settlement X's liability can be determined by the exercise of a power vested in Y, subject to the consent of Z. If this were all, then the annual payments would be caught by section 38 (1). Let it, however, be supposed that the power vested in Y is not exercisable within the period of six years from January 1, 1941—*i.e.*, within the period ending December 31, 1946. The effect of the proviso to sub-section (1) of section 38 is that sub-section (1) will not apply to annual payments becoming payable at a time when the power cannot be exercised.

While sub-section (1) is concerned with revocable covenants for annual payments, sub-section (2) is concerned with revocable settlements of property. The test will be substantially the same as that applied by sub-section (1) in the case of annual payments.

Are the terms of the settlement such that there is a person who, by the exercise of a power of revocation or some analogous power, can cause the settlor, or the settlor's wife (or husband), to become beneficially entitled either to the settled property or some part of it, or to the income arising from the whole or part of that property? If so, then the income arising under the settlement, or the appropriate fraction of that income, as the case may be, will be treated, for tax purposes, as the income of the settlor and not as the income of any other person. As in the case of sub-section (1), it will make no difference whether the person in whom the power is vested is the settlor or someone else, or whether the exercise of the power does or does not require the consent of some other person.

Subject to the proviso to sub-section (2), it will make no difference that the power of revocation (to use a compendious expression) is not immediately exercisable. It will be sufficient that the terms of the settlement are such that the power will or may become exercisable in the future. Let it, however, be supposed that a particular item of property became subject to the trusts of a settlement on a given date, and that the power of revocation, etc., is not exercisable within six years from that date. In such a case the effect of the proviso to section 38 (2) will be that the income arising under the settlement from that item of property (or from property representing it) will not be caught by the sub-section so long as the power cannot be exercised. The interval must be one of at least six years, but if it is longer, the proviso will apply throughout its duration. In relation to the income arising under the settlement from any particular item of property, the question to be asked will be : Will the power be exercisable within six years of the time when that item of property (or the property which it represents) first became comprised in the settlement? If not, then section 38 (2) will not apply to that income until the power becomes exercisable.

Sub-section (3) of section 38 is directed against the accumulation of income. If the settlor " has an interest " in the income arising under a settlement or in the property comprised therein, then so much of that income as is not distributed will be treated as the income of the settlor and not of any other person. This is subject to two qualifications. First, there will be cases in which the settlor " has an interest " neither in the whole of the income arising under the settlement nor in the whole of the property comprised therein. Where this is the position, the application of section 38 (3) will be limited to so much of the undistributed income as is proportionate to the settlor's interest. Secondly, the undistributed

income to be taken into account for the purposes of sub-section (3) of section 38 is exclusive of any income which falls to be treated as the income of the settlor by virtue of sub-section (1) or sub-section (2). But for this proviso there might be more than one attribution of the same income to the same individual. Whether income arising under a settlement in any year is to be treated as not having been distributed must be determined by reference to section 41 (4). Without discussing the definition in detail, it will be sufficient, for the present purpose, to say that its broad effect is that the income arising in any year will be deemed not to have been distributed in so far as it exceeds the aggregate amount of (a) trust expenses paid in that year, being expenses properly chargeable to income, and (b) other payments made in that year, being payments of such a nature that they fall to be treated for tax purposes as income of the recipients, or would fall to be so treated if the recipients were domiciled, resident and ordinarily resident in the United Kingdom and the payments had been made to them therein.

As already pointed out, the provisions of the Act with reference to undistributed income must be considered in relation to the definition of " income arising under a settlement " in section 41 (4). It has been seen that, as a result of that definition, the " income arising under a settlement " may include notional income in the shape of income of a privately controlled company which has, under the companies surtax legislation, been apportioned to the trustees of the settlement or a beneficiary thereunder. Any such notional income must, of necessity, be income which has not been distributed and must accordingly be attributed to the settlor where sub-section (3) of section 38 applies.

In order that undistributed income may be caught by section 38 (3), it must be shown that the settlor " has an interest " either in the " income arising under the settlement " or in the property comprised therein. Whether the settlor " has an interest " must be determined by reference to the provisions of section 38 (4), which lays it down " the settlor shall be deemed to have an interest in income arising under or property comprised in a settlement, if any income or property which may at any time arise under or be comprised in that settlement is, or will or may become, payable to or applicable for the benefit of the settlor or the wife or husband of the settlor in any circumstances whatsoever ". As to the words " the wife or husband of the settlor ", it has not yet been authoritatively decided whether the settlor is to be deemed to " have an interest " by reason only of the fact that the wife (or husband) of the settlor will or may become entitled to receive some benefit *after the*

settlor's death. A broader question arises as to the scope of the sweeping words "may become payable . . . or applicable . . . *in any circumstances whatsoever*". These words have not yet been judicially construed, but they must in any case be read subject to certain qualifications contained in the provisos to section 38 (4). The effect of proviso (a) is that a settlor is not to be treated as "having an interest" in income arising under a settlement, or in property comprised therein, if neither he (or she) nor his (or her) wife (or husband) can become entitled to that income or property save on the happening of one of certain events. These events include the bankruptcy of a beneficiary entitled, or contingently entitled, to that income or property, and the charging or assignment of the income or property by a beneficiary entitled thereto. They also include, in the case of a marriage settlement, the death of both the parties to the marriage and of a child or children of the marriage—not necessarily *all* the children. Lastly, they include the death under the age of twenty-five, or some lower age, of a person who would have become entitled to the income or property on attaining that age. This covers the case of a settlement by which (for example) accumulations of income directed to be made for the benefit of a beneficiary on attaining the age of (say) twenty-five are to return to the settlor if the beneficiary dies before attaining a vested interest. It is to be noted that the exemption will operate only where the age at which the beneficiary will attain a vested interest is twenty-five or less. One further qualification of the definition in section 38 (4) of "having an interest" is added by proviso (b). Let it be imagined that in the case supposed above the vesting age was not twenty-five but thirty. In that case the effect of proviso (b) would be that the settlor would not be deemed to "have an interest" so long as, but no longer than, the beneficiary was under twenty-five.

Where a settlor has become chargeable to tax by virtue of any of the sub-sections of section 38, he can, having paid the tax, recover the amount so paid from any trustee or other person to whom income arises under the settlement. If, for example, income is accumulated by the trustees of a settlement and the case is one to which section 38 (3) applies, the undistributed income will form part of the settlor's total income for surtax purposes, but the amount of the surtax paid by him in respect of that undistributed income, treated as the highest part of his income, will be recoverable from the trustees—see Third Schedule to the 1938 Act, Part I.

Further provisions relating to the accumulation of income are contained in section 39. This section deals with the accumulation of income in the shape of annual payments. The effect of section 39

is, broadly stated, that notwithstanding that there is no such power of revocation or the like as will bring the settlement within section 38 (1), and notwithstanding that the settlement is not one in which the settlor "has an interest" so as to come within section 38 (3), annual payments paid by the settlor (or by the settlor's wife or husband) to the trustees of a settlement will, nevertheless, not be allowed as deductions in the computation of the settlor's total income if, and to the extent to which, they are accumulated. Payments to the trustees of the settlement are to be taken, for the purposes of section 39, to include payments to any "body corporate connected with the settlement". The "body corporate connected with the settlement" re-appears in section 40, which will be considered in due course. The expression is defined in section 41 (4) (e) of the Act. The effect of the definition is that the test will be whether the body corporate is of the privately controlled type aimed at by the companies surtax legislation, and, if so, whether any income of the body corporate has been apportioned, under that legislation, to the trustees of the settlement or any beneficiary thereunder, or could have been so apportioned if the body corporate had been incorporated in the United Kingdom. It will, however, be no answer to say that, since the income of the body corporate has in fact been fully distributed to its members, there could be no question of a direction under the companies surtax legislation and therefore no question of an apportionment. It will be sufficient for the Revenue authorities to show that an apportionment to the trustees of the settlement or a beneficiary thereunder could have resulted from a direction, had the conditions for a direction been satisfied.

While section 38 applies to all settlements, whenever made, the settlements to which section 39 applies are those made after April 26, 1938. If, however, a settlement made before that date is caught, in its original form, by the provisions of section 38 dealing with revocable settlements and has been varied so as to escape those provisions, then section 39 will apply to that settlement as from the date when the variation took effect.

Section 40 of the 1938 Act deals with the payment of capital sums to a settlor by the trustees of a settlement. Section 40 is directed primarily against loans to settlors, but for the purposes of that section "capital sum" includes, not only any sum paid by way of loan or repayment of a loan, but also (subject to certain qualifications) any other capital payment, being a payment made otherwise than for full consideration in money or money's worth. Any such capital sum paid to the settlor by the trustees of a settlement in (say) the year of assessment 1940–41 will fall to be

treated as income of the settlor for 1940–41 in so far as it does not exceed "the income available" up to April 5, 1941. If and in so far as it does exceed "the income available" up to April 5, 1941, the excess will fall to be treated as income of the settlor for 1941–42, in so far as it does not exceed "the income available" up to April 5, 1942, and so on. What is meant by "the income available" up to the end of a given year of assessment is explained in sub-section (2) of section 40. In order to determine the amount of income available up to the end of (say) 1940–41, it will first be necessary to ascertain how much of the income arising under the settlement in 1940–41 and any previous "relevant year" has not been distributed, the expression "relevant year" meaning any year of assessment after 1937–38. Reference has already been made to the tests prescribed by section 41 (4) for determining whether income arising in any year is to be treated as not having been distributed. From the aggregate amount of the undistributed income, as thus ascertained, must then be deducted, first, the aggregate amount of any other "capital sums" previously paid to the settlor in or after 1938–39, and, secondly, the aggregate amount of any undistributed income arising under the settlement in or after 1938–39 which has been caught by sub-sections (1), (2) or (3) of section 38 or by section 39. When these deductions have been made, the resulting figure, less tax thereon at the appropriate standard rate, will be treated as the amount of income available to the end of 1940–41.

It will make no difference that the capital sum is paid, not to the settlor, but to the settlor's wife or husband. Again, it will make no difference that the trustees made the payment through an intermediary, since section 40 (1) speaks of "any capital sum paid *directly or indirectly* . . . by the trustees of a settlement . . . to the settlor". Further, section 40 (3) provides that any capital sum paid to the settlor by any "body corporate connected with the settlement" (an expression already explained) shall be treated as having been paid by the trustees of the settlement.

It is desired once more to make it clear that this article does not purport to be an exhaustive commentary on sections 38—41 of the 1938 Act. It is intended only to serve the limited purpose of drawing attention to their principal features.

THE DEFENCE (EVACUATED AREAS) REGULATIONS, 1940 (*a*).

By Lionel A. Blundell, LL.M., Barrister-at-Law.

The Defence (Evacuated Areas) Regulations, 1940 (S. R. & O., 1940, No. 1209), grant a moratorium as to certain debts in areas defined as "evacuation areas". An evacuation area must be part of a "defence area", but since by S. R. & O., 1940, No. 1503, made under Regulation 16A of the Defence (General) Regulations, 1939 (added by S. R. & O., 1940, No. 842) on August 16, 1940, the Minister of Home Security has declared the whole of Great Britain to be a defence area, this limitation ceases to be of consequence except in Northern Ireland. It is the Minister of Home Security who makes the Orders declaring areas to be evacuation areas, but these Orders are not published and any person who requires to know whether or not an area has been declared an evacuation area should make inquiries from the Registrar of the county court for the district or from the clerk to the local authority. It may be noted that the Minister may declare an evacuation area where that area either has been *or is likely to be* evacuated.

The condition upon which the Order operates is (by Regulation 4) that premises in the evacuation area shall be unoccupied at the date when the area is declared an evacuation area or subsequently become unoccupied. A slightly different condition, which does not concern us here, is laid down in respect of hire or hire-purchase payments. There is a special meaning of "unoccupied" which will be considered below. Where the above condition is satisfied the result is that thereupon the "evacuation period" commences and thereafter certain kinds of debts are not recoverable during the evacuation period, which continues until another Order is made by the Minister of Home Security determining the period. These debts include rent, rates, sums secured or charged on the premises, tithe redemption annuities, and water, gas, electricity and telephone charges. It must be clearly understood that although such debts are irrecoverable *during* the evacuation period, they are not cancelled and they will all accumulate and be recoverable in full *after* the period, unless some other Order is then made regulating the position.

This moratorium does not apply to rent or other debts which

(*a*) For special considerations appropriate to mortgages, see the article "Mortgages in Wartime" in this issue of *The Conveyancer*, at p. 52.

accrued due and payable before the commencement of the evacuation period, nor to rates in respect of a period completed before the commencement of the evacuation period.

Another proviso excludes from the moratorium " any such rent or sum as aforesaid payable under a lease, mortgage or other contract entered into after the date of these Regulations ", that is to say, after July 10, 1940. Since any part of the country may become an evacuation area at some future date though at present apparently removed from the more urgent perils of war, this provision will penalise persons who enter into a lease or mortgage in respect of premises in such an area after July 10, 1940, and if at a future date the particular area becomes an evacuation area they will not have the benefit of any moratorium under this Order.

In order to limit the benefit of the Order to the actual loss of the benefit of the enjoyment of property consequential upon evacuation, the Court is given a special jurisdiction under paragraph (4) of Regulation 4 to deal with cases where, for example, the tenant or mortgagor of unoccupied premises has during the evacuation period resided in the area or has enjoyed a substantial benefit from the premises either during the evacuation period or during the period in respect of which the rent or other sum is payable, or where the lease, mortgage or contract comprises also other property not within the Regulation. In such cases the Court may make such Order removing or modifying the restrictions imposed by this Regulation as it thinks fit, and may apportion any part of the liability to any period or premises.

The Order contains no actual definition of the term " unoccupied ", but for the purposes of this Regulation premises are deemed to be " unoccupied " in circumstances which would constitute " occupation " for rating purposes. Besides including premises requisitioned by a Government Department, the expression extends to premises unoccupied for the time being but to which someone intends to return when circumstances permit, and furthermore it is provided that no premises shall be deemed to be occupied by reason only of the presence therein of furniture or other goods. This affords protection to the many occupiers of property who leave chattels therein and intend to reside elsewhere for the duration only of the wartime circumstances giving rise to the evacuation period. This is a special meaning of " unoccupied " and therefore it must not be interpreted in the light of cases determining liability to rates. It may be mentioned here, however, that there may possibly be circumstances of compulsory evacuation (as where the owner is debarred from using a seaside bungalow) such that, although furniture is left therein, there is a strong argument that there is no

rateable occupation, the user of the premises for any reasonable purpose being in effect for the time being prohibited: see such cases as *Lambeth (Churchwardens)* v. *London County Council*, [1897] A. C. 625, and *C. K. Marr's Trustees* v. *Ayrshire Assessor* (1934), 20 Rating and Income Tax 355. See, however, as to the wide meaning of "beneficial occupation" in rating law, *Gage* v. *Wren* (1902), 87 L. T. 271; *Bayliss* v. *Chatters*, [1940] 1 All E. R. 620.

Another provision of Regulation 4 of the Order extends the benefit of the moratorium to guarantors, indemnifiers and insurers of debts mentioned in the Order (*b*).

Regulation 6 of the Order contains a distinct provision extending the benefit of the Courts (Emergency Powers) Act, 1939, in the case of a person affected directly or indirectly—

(a) by the evacuation of an evacuation area or by the provisions of these Regulations in their application to such an area; or

(b) by the evacuation of any premises in pursuance of advice given by or on behalf of any Government Department; or

(c) by any Order made under Regulation 16A or 21 of the Defence (General) Regulations, 1939, requiring the removal of animals from any area.

The extension afforded is that if such person's inability to satisfy a judgment or order for the payment or recovery of a sum of money due under a contract, or for the recovery of possession of land in default of payment of rent, is due to his being so affected as aforesaid, the Court's powers under the Courts (Emergency Powers) Act, 1939, with respect to the enforcement of such a judgment or order are made applicable to contracts and leases entered into after September 3, 1939, but before July 10, 1940. With regard to the exercise of remedies under section 1 (2) (a) of the Courts (Emergency Powers) Act, 1939 (distress, re-entry, appointment of a receiver, etc.), the Court is given power to grant an injunction restraining the exercise of such remedies, and in the case of a mortgage may also grant an injunction restraining the institution of proceedings for foreclosure or for sale in lieu of foreclosure or for the recovery of possession of the mortgaged property or make an order staying any such proceedings previously instituted.

This Regulation in fact effects a considerable extension of the Courts (Emergency Powers) Act, because under paragraph (a), for example, many persons may directly or indirectly suffer pecuniary loss by the evacuation of an area or by the application of these Regulations in granting a moratorium as to certain debts in the area. A business man carrying on business in the evacuation

(*b*) *Ibid*, "Position of Guarantors, etc."

area, or a landlord owning property there, may as a result of the evacuation or the moratorium be unable to meet his obligations to another person not resident or carrying on business in the evacuation area who in turn may claim the benefit of this Regulation as against his creditors as being a person indirectly affected.

Applications to the Court under these Regulations are governed by the Courts (Emergency Powers) (Evacuated Areas) Rules, 1940. The "appropriate Court" which has jurisdiction under paragraph (4) of Regulation 4 (see above) is the county court of the district where the premises in respect of which the liability arises are situate, or in which the person liable resides or carries on business, or (if that person does not reside or carry on business in England or Wales) in which the person entitled to the sum in question resides or carries on business (Rule 1).

Under paragraph (1) of Regulation 6, which makes the Courts (Emergency Powers) Act, 1939, applicable to the enforcement of certain judgments and orders for the payment or recovery of money due under a contract or for the recovery of possession of land for non-payment of rent, the appropriate Court is the Court in which the proceedings are pending or by which the judgment or order was given or made (Rule 2).

Under paragraph (2) of Regulation 6, which gives jurisdiction to the Court to restrain by injunction the exercise of certain remedies, the appropriate Court is the High Court or alternatively the county court in the case of—

(a) the levying of distress where the amount distrainable does not exceed £200;

(b) the taking possession of, appointment of a receiver of, or re-entry upon, land where neither its value nor the rent exceeds £100 by the year;

(c) the realisation of security where the mortgage, charge or lien is for not more than £1,000;

(d) the taking possession or appointment of a receiver of property other than land, where the value of the property does not exceed £200;

(e) the forfeiture of a deposit where the amount in respect of which the deposit has been made does not exceed £200.

In the case of an injunction to restrain proceedings for foreclosure or for sale in lieu of foreclosure or for the recovery of possession of mortgaged property, the appropriate Court is the High Court, or alternatively the county court where the proceedings sought to be restrained could be instituted in the county court. Where the appropriate Court for the grant of an injunction is the county court, it may be the county court for the district where either the

applicant or the person against whom the injunction is sought resides or carries on business, or where the property is situate. An application to stay proceedings already instituted for foreclosure or sale in lieu of foreclosure or for the recovery of possession of mortgaged property must be made to the Court in which the proceedings are pending.

Where the High Court and a county court have concurrent jurisdiction the application must not be made in the High Court, except in special circumstances.

Rules 5 to 11 set out detailed provisions as to procedure, which is by originating application under Regulation 4 (4), by application containing a statement to the effect of Form No. 3 in the Appendix to the Rules in the case of an application under Regulation 6 (1), by originating summons in the case of an application to the High Court under Regulation 6 (2), and by originating application in the case of an application to the county court under the same paragraph of Regulation 6. The Appendix to the Rules contains forms of originating application.

Note on hire-purchase agreements.—The Defence (Evacuation Areas) Regulations apply, naturally, to local debts. This includes a contract for " the hiring or hire-purchase of goods by a person who, in the case of goods used *solely* for the purpose of a business, has ceased to carry on that business in an evacuation area or, in any other case, has ceased to reside in the area ". The " evacuation period " during which the Regulations apply in this case is defined as " the period commencing with the date of the evacuation order (see article above) or the date on which [the] person ceased to reside or carry on business, whichever is the later ", and ends on the appointed day. No sum is recoverable under the contract during the evacuation period subject to the provision contained in Regulation 4 (4), by which the Court may modify this restriction in favour of the person entitled to receive the money, where a substantial benefit has been enjoyed since the commencement of the evacuation period.

The Regulations do not apply unless the goods, *or some part thereof*, were in the area at the commencement of the evacuation period and have not been removed from that area *by or on behalf of the hirer* before the date on which the sum first accrued due and payable.

Apart from these Regulations what is said in the above article generally applies to contracts of hiring and hire-purchase. The

contract, popularly called hire-purchase but strictly described as credit sale (a distinction more than once drawn in the columns of this Journal), does not appear to fall within the purview of the Regulations. Similarly, if goods are not used solely for the purpose of a business, *e.g.*, a car, they will not fall within the Regulations where the hirer carries on business inside the area and resides outside it. Apparently, also, if goods used in connection with a business are transferred outside the area for their preservation or safety by or on behalf of the hirer any instalment subsequently falling due will not be protected by the Regulations. If the business is in fact killed by an evacuation order there would seem to be a great temptation to leave all goods on hire-purchase to their fate. What legal result would occur, if in such circumstances the owner of the goods then transferred them to a place of safety, it is difficult to guess, and no doubt would depend to some extent upon the terms of the hiring agreement.

H. P.

THE WAR AND MORTGAGES.

By E. O. WALFORD, LL.D., Solicitor.

The most obvious remark concerning mortgages in war-time is that there are very few new mortgages and many troubles in connection with existing mortgages. The difficulty of effecting a scheme of insurance against war risks is fully appreciated; but the fact remains that whilst such insurance is unobtainable (apart from forms of "mutual insurance") the purchase of property, the re-arrangement of existing mortgages and the grant of new mortgage advances will be very much hampered. On the other hand the problems in connection with pre-war mortgages have substantially increased. It is not possible in the space available in this number to deal with the effect of the Defence (Finance) Regulations upon proposed mortgages or with the Courts (Emergency Powers) Rules; but it is hoped that the gathering together in this article of the more important of the statutory provisions affecting mortgages and of the cases already decided in connection with those provisions, or similar provisions contained in statutes passed during the last war, will carry the reader some way along the road in his laborious search for light upon the meaning and operation of the war legislation, so far as it affects mortgagors and mortgagees of land. The material below may be taken to cover the war period up to August 24, 1940.

Beyond that date the reader must search for any Acts or statutory rules and orders, or regulations or the like which may affect the position.

Restrictions upon Enforcement of Mortgages.

Courts (Emergency Powers) Acts and the Possession of Mortgaged Land (Emergency Provisions) Act, 1939.

It is proposed to refer to the Courts (Emergency Powers) Act, 1939, and the Courts (Emergency Powers) Amendment Act, 1940, as the C. E. P. Act, 1939, and the C. E. P. Act, 1940, and to the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, as the P. M. Act, 1939.

Exceptions.

(1) These Acts do not affect the enforcement of mortgages created on or after September 2, 1939, although war-time mortgagors of controlled houses enjoy a certain measure of protection, as mentioned below.

(2) Moreover, as to certain remedies available to mortgagees, it will be noted from the observations below that the leave of the Court is not necessary if the mortgagee was personally or by his receiver in possession before September 2, 1939.

Restriction on enforcement of order for payment of money.

(a) The C. E. P. Act, 1939, provides that no person shall without the leave of the Court be entitled to proceed to execution on or otherwise to the enforcement of any judgment or order for the payment or recovery of a sum of money (with certain exceptions not material here) (section 1 (1)).

Restriction on exercise of remedies.

(b) (i) The same Act also enacts (subject to the proviso mentioned below : see "*When remedies not restricted*") that no person shall without the like leave, proceed to exercise any remedy by way (*inter alia*) of :—

(i) The taking of possession of any property or the appointment of a receiver of any property.

(ii) The realisation of any security.

(iii) The serving of a demand under section 169 (1) of the Companies Act, 1929. (Under that sub-section a creditor for a sum exceeding £50 may serve a notice on a company requiring payment of the debt within three weeks, and

neglect to comply with such a notice is a ground for the winding up of the company (section 1 (2)).

These remedies are in the main self-help remedies not requiring any order of the Court in peace-time.

As to (i)—(the taking of possession, etc.).

It appears that where a mortgagee takes any definite step by way of depriving the mortgagor of the control of the property, *e.g.*, by serving on the tenants of the property notice that all future rents are to be paid to him until further notice, this constitutes a taking of possession (*Noyes* v. *Pollock* (1886), 32 Ch. D. 53). As to the appointment of a receiver, see *Gasson & Halligan, Ltd.* v. *Jell*, [1940] W. N. 31; 56 T. L. R. 295, where an unsuccessful attempt was made to avoid the necessity for obtaining the leave of the Court to foreclose or sell by applying to the Court for an order appointing a receiver. See also the observations on that decision below, under the heading "*When remedies not restricted*".

As to (ii)—(the realisation of any security).

There appears to be nothing to prevent a mortgagee from entering into a contract for sale of the mortgaged property before obtaining the leave of the Court. In *Braybrooks* v. *Whaley*, [1919] 1 K. B. 435, an attempt was made by a purchaser to repudiate the contract for sale on the ground that the vendor had not obtained the leave of the Court as required by the C. E. P. Act, 1914, in the case of the realisation of the security. It was, however, held that the want of leave of the Court at the time of the contract could not be regarded as an essential defect of title, the defect being merely one of conveyance, *i.e.*, a matter to be dealt with in relation to the valid conveyance of the property to the purchaser. It was held in *Perry* v. *South Metropolitan Gas Co.*, [1940] 1 All E. R. 591, that the cutting off of the supply of gas (upon default in payment of rent for equipment) is not the "realisation of a security".

In *Re Jobson's Application*, [1918] 87 L. J. Ch. 251, Eve, J., discussed the principles upon which the Court should act when dealing with applications by mortgagees for leave to exercise their remedies. The following working rules as laid down by Mr. Justice Eve are taken from Messrs. Krusin & Rogers' excellent *Handbook of War Legislation*:—

(a) If the security is sufficient, and the mortgagor's covenants (other than the covenant to repay the principal) have been observed the mortgagor should be given a reasonable time

to find the money to redeem. [But it will be appreciated that during the present war it may be very difficult to find anyone who will lend substantial sums of money upon houses or other buildings, having regard to the fact that insurance of that class of property against war risks cannot be effected.]

(b) The time so given should be extended if, where the interest under the mortgage is less than 5 per cent., the mortgagor is willing to pay interest at 5 per cent., and still further extended if in addition he is willing to pay, on account of the principal, the difference between the actual net rents and interest at 5 per cent. [It does not follow that 5 per cent. is the appropriate rate of interest at the present day.]

(c) If the mortgagor is in occupation, and the proper occupation rent would exceed 5 per cent. interest on the debt, he ought to attorn tenant to the mortgagee at the occupation rent, pay interest at 5 per cent. and pay the balance of such rent in reduction of the principal. [See note above as to rate of interest.]

(d) If the security is insufficient, but interest has been paid up to date, and all the other mortgagor's covenants have been observed, time should be given to the mortgagor on the terms that interest at 5 per cent. is paid, with liberty to the mortgagee to renew the application if the security depreciates further.

(e) If the security is insufficient and interest is in arrear, but not to a serious degree, the mortgagor should be required to clear off the arrears in addition to complying with the terms of (d), *supra*.

(f) If in a case falling under (d) or (e), the actual rent or a proper occupation rent of the property exceeds the interest, the mortgagee should be allowed to appoint a receiver; if he does so and the case falls under (e), *supra*, it may be necessary to give the mortgagor a reasonable time to pay off the arrears.

(g) Wherever there are substantial arrears of interest, or covenants to keep down outgoings, or to repair or insure, have been broken, the mortgagee should, except in very special circumstances, be allowed to exercise his remedies, unless the mortgagor is prepared to make good the default forthwith and to continue under the conditions mentioned under (d), (e) and (f), *supra*.

(ii) The C. E. P. Act, 1939, also prescribes (subject to the

proviso to section 1 (2) mentioned below) that the leave of the Court must be obtained before the institution of any proceedings for foreclosure or for sale in lieu of foreclosure, and also before the taking of any step in any proceedings for foreclosure or sale in lieu thereof which had been instituted before September 2, 1939.

Foreclosure or sale (C. E. P. Act, 1939, s. 1 (2) (b)).

Where a judgment creditor had obtained a charging order on shares in a company and then proceeded to take out a summons to enforce his security by the sale of the shares, he was held in 1917 to be instituting proceedings "for foreclosure or sale in lieu of foreclosure", although the practice under section 14 of the Judgment Act, 1838, was to order the sale of the shares and not to grant an order of foreclosure (*Hosack* v. *Robins*, [1917] 1 Ch. 332); and it seems clear that the leave of the Court under the Act is necessary in relation to any application for a charging order upon stock or shares (Rule 12 of the C. E. P. Rules, 1939; see now the C. E. P. (Consolidation) Rules, 1940). Leave to obtain a charging or garnishee order *nisi* does not appear to have been necessary under the C. E. P. Act, 1914 (*Keats* v. *Connolly*, [1915] W. N. 174, C. A.); but the making of the order absolute amounts to "proceeding to execution on or to the enforcement of" an order (*ibid.*). However, by Rule 13 of the C. E. P. (Consolidation) Rules, 1940, an application for leave to enforce a judgment by garnishee order should be made at the hearing of the garnishee proceedings (subject to the appropriate steps being taken), unless leave under the Act is unnecessary; and generally application to enforce a judgment can be made at the time of the judgment in manner prescribed by the C. E. P. (Consolidation) Rules. During the last war on a summons for an order of foreclosure absolute under the then Courts (Emergency Powers) Acts, Neville, J., being of opinion that the property was unsaleable, ordered the summons to stand over for six months (*Prudential Assurance Co.* v. *Wade*, 61 S. J. 577). See and cf. *Re Jobson's Application*, *supra*.

If the mortgagee has commenced proceedings for foreclosure before September 2, 1939, it is necessary for him to obtain the leave of the Court for the continuance of those proceedings. See and cf. *Re Anderson & Son, Ltd.* (1916), 32 T. L. R. 715, where the result of section 1, C. E. P. (No. 2) Act, 1916, as read with section 1 (1) of the C. E. P. Act, 1914, was different. But where an action has been set down for trial before September 2, 1939, no leave is necessary before the hearing can take place: on the other hand, when an order is made leave will be required for enforcing it, and in the case of a foreclosure order *nisi* leave will be required before

it is made absolute (*Moorgate Estates, Ltd.* v. *Trower*, [1940] 1 All E. R. 195).

Taking steps (C. E. P. Act, 1939, s. 1 (2) (b)).

In the same case it was laid down that "taking any step" means taking any interlocutory action before the action is set down and is ripe for trial. Farwell, J., observed that at that stage it was no longer possible to get a summons before the Master, as the matter had passed out of his hands and was solely one for the Court, and the leave of the Judge to hear the action was unnecessary. He further ordered the appointment of a receiver, observing that nothing in the Act necessitated any express leave for the appointment of a receiver *by the Court*. See further as to "steps" in proceedings, *Welby* v. *Parker*, [1916] 2 Ch. 1, and *Gasson & Halligan, Ltd.* v. *Jell*, [1940] 1 Ch. 248 (in argument).

When remedies not restricted (proviso to C. E. P. Act, 1939, s. 1 (2)).

By reason of a proviso to section 1 (2) of the C. E. P. Act, 1939, the observations above concerning the necessity for leave to proceed to exercise certain remedies (para. (b) (1), *supra*), or to institute proceedings for foreclosure or sale in lieu of foreclosure, or take any steps in such proceedings instituted before September 2, 1939, do not apply to the following:—

(a) The exercise of his power of sale by a mortgagee of land or any interest in land who was in possession of the mortgaged property immediately after September 1, 1939, or who before September 2, 1939, had appointed a receiver who was immediately after the expiry of September 1, 1939, in possession or in receipt of the rents and profits of the mortgaged property (section 1 (2), proviso (a)). Under the Courts (Emergency Powers) Act, 1914, it was held in an Irish case that the term "mortgagee in possession" in section 1 (1) (b) of that Act (which see) meant a mortgagee who had taken possession without obtaining the leave of the Court (*i.e.*, under that Act) (*Re Provident Association of London and Gollogally's Contract*, [1917] 1 Ir. R. 240); but it is clear that that decision does not hold good in relation to the above-mentioned proviso to section 1 (2) of the C. E. P. Act, 1939. The *ratio decidendi* has no application to the wording of the C. E. P. Act, 1939 (whether to proviso (a) or proviso (b) of section 1 (2) of that Act).

(b) Any power of sale of a mortgagee in possession of property *other than* land or some interest in land, where the power of sale has arisen and notice of the intended sale had been given before September 2, 1939 (section 1 (2), proviso (b)).

Thus where a mortgage of shares has been effected by a completed transfer of shares to the mortgagee and the shares stand in the name of the mortgagee, no leave would be necessary if the power of sale had arisen and notice of the intended sale had been given before September 2, 1939. It will be noted that the power of sale need only have arisen. It need not have "become exercisable". But as between the mortgagor and the mortgagee it is clear that the latter will be liable in damages to the former if he sells before his power of sale has become exercisable.

As to the meaning of "mortgagee in possession" see the note following paragraph (1), *supra*. The term would seem to apply whether the mortgagee had obtained an order of the Court or had merely taken possession without the aid of the Court.

(c) Any right or power of pawnbrokers to deal with pledges (section 1 (2), proviso (c)).

(d) The institution or prosecution of any proceedings for the appointment by the Court of a receiver of any property or for the recovery of possession of land (section 1 (2), proviso (d)). (But see further below as to the special provisions affecting the recovery of possession of land under the P. M. Act, 1939.)

It will be seen that if the mortgagee wishes merely to apply for the appointment *by the Court* of a receiver leave under the Act is not necessary. But where the mortgagee applied for an account and an order for payment of the sum due and the appointment by the Court of a receiver, the order was refused (*Gasson & Halligan, Ltd.* v. *Jell*, [1940] 1 Ch. 248. Farwell, J., declining to grant the application, observed that it was a device to avoid an application under section 1 (2) (b) of the C. E. P. Act, 1939, whilst asking the Court to appoint a receiver, a step which in a foreclosure action might be necessary to protect the security. If foreclosure or sale *had* been sought leave would have been necessary, and the defendant could have urged that his inability to pay was due to the war. He considered that if leave was obtained to foreclose and then a motion was made for the appointment of a receiver, the Court could appoint one without further application

under the Act. Nevertheless, apart from the C. E. P. Act, 1939, he thought that the Court exercising its ordinary discretion of seeing whether justice required such appointment, must see how far the difficulty of the mortgagor was due to circumstances arising from the war. It is submitted that the last observation is contrary to the spirit of the Act under which leave is required presumably in all cases where it is intended that the defendant shall have relief (under section 1 (4)) upon the ground that he cannot pay owing to the war. It is only "on any application for such leave" that the Court is given the right to refuse to make the order or to impose restrictions, etc., on the ground of inability to pay. Curiously enough section 1 (1), which appears to raise a more difficult question of conflict between sub-section (1) and proviso (d) (*supra*) of sub-section (2), does not appear to have been mentioned. If the mortgagee simply obtains judgment for the debt, then section 1 (1) appears to apply, *vide supra*. The rules provide that application under section 1 (1) for the appointment of a receiver may be made at the hearing of the application for such appointment, and unless such application is made *or leave is shown to be unnecessary* the order for appointment of a receiver will not be made. A specified notice (Form 6) has to be served on the debtor: see C. E. P. (Consolidation) Rules, 1940 (April 9, 1940). In obtaining an order appointing a receiver, a mortgagee who has obtained judgment for the debt is "proceeding to the enforcement of" the judgment (*Re Farnol, Eades, etc., Ltd.*, [1915] 1 Ch. 22); but see C. E. P. Act, 1939, s. 1, proviso (d), where judgment has not been obtained. Although such a step is not legal execution it is conveniently called equitable execution: *ibid.*

It should be observed here that by virtue of section 2 (2) of the P. M. Act, 1939, references in the C. E. P. Act, 1939, to judgments or orders for the recovery of possession of land include references to any judgment or order the effect of which is to enable a person to obtain possession of land, and in particular includes, in relation to a mortgagee, a judgment or order for the delivery of possession of land (see Rules of the Supreme Court, Order 47, rr. 1, 2).

It will be noted that this sub-section does not apply to "proceedings for the recovery of possession of land" but only to "judgments or orders". Section 2 (2) of the P. M. Act, 1939, does, however, apply to cases falling within sub-section (3) of section 1 of the C. E. P. Act, 1939 (as amended by the P. M. Act, 1939). The question of the enforcement of orders for possession of land, and the provisions of the P. M. Act, 1939, will be dealt with in our next issue.

(*To be continued.*)

NOTES OF RECENT CASES.

1. *CONVEYANCING AND REAL PROPERTY CASES.*

Registered land—covenants binding on the land.—Newman v. *Real Estate Debenture Co.*, [1940] 1 All E. R. 131, is primarily of interest in the law of landlord and tenant and is noted under that head. It is, however, of some importance to the law of registered land. In this connection the point was whether a grantee of a leasehold reversion was bound by restrictions imposed in leases of the freehold for the benefit of all the land. The covenants were not entered in the Charges Register under section 50 of the Land Registration Act, 1925, nor under the Land Charges Act, 1925. The plaintiff in the proceedings was one of the lessees, who sued the grantee as owner of the leasehold reversion. Atkinson, J., held that the grantee was bound by the covenant and that it was immaterial that it was not entered in the Charges Register of the freehold title.

It was argued that the grantee was not bound, because, although the covenants were contained in leases, they could only be enforced as between lessees, that is as equitable restrictive covenants, if they were registered. The learned Judge refused to decide this point on the ground that the grantee of the leasehold reversion was sued as such and not as a lessee, and hence the covenants were strictly covenants as between lessor and lessee and as such not requiring registration.

This case should be associated with *White* v. *Bijou Mansions*, [1938] 1 Ch. 351, in which it was held that a lessee or sub-lessee was bound by restrictive covenants entered on the freehold title. A lessee of registered land will therefore be bound by all restrictive covenants entered against the freehold title and by all covenants in leases whether or not entered on the title, provided in the latter case that he had notice.

It should be observed that leases of registered land are noted on the title of the lessor. Therefore no lessee should accept a lease without an investigation of the register. In view of the simplicity of the investigation there seems little reason for the old-fashioned objection to the lessor supplying an abstract of title.

One other point should be noted. It was argued that absence of registration under the Land Registration Act or the Land Charges Act rendered the covenants unenforceable. It would seem that in registered land where registration under the Land Charges Act is necessary it is requisite that the covenant should be protected

under the Land Registration Act, s. 50. It is thought that there is no doubt that registration under the Land Charges Act alone is not sufficient nor that it is necessary.

Mines — custom to let down the surface — unreasonable. — *Wolstanton, Ltd.* v. *Newcastle Borough Council*, [1940] 3 All E. R. 101, must not be carried too far, because it arose on facts which had been litigated in *Hilton* v. *Granville* (1844), 5 Q. B. 701, and the House of Lords were unwilling to disturb that decision on the same facts. The appellants claimed the right as tenants of the quondam lord of the manor to work mines under the quondam copyhold land in such a manner as to let down the surface without liability for compensation for damage caused by subsidence. They based their claim on custom and prescription. The House of Lords held that the custom was unreasonable and void. Lord Maugham, in a speech in which the other Law Lords concurred, discussed the earlier case cited above and the other relevant authorities, and said (at p. 111): "I find it very difficult, if not impossible, to hold that a custom for the lord to get minerals beneath the surface of copyhold or customary freehold lands without making compensation for subsidence and damage to buildings is a reasonable custom while accepting the view that a custom for the lord and his tenants of collieries to lay the rubbish in heaps on the copyhold lands near the pits (as in *Broadbent* v. *Wilks* (1742), Willes 360) is unreasonable. In either case, the lands of a copyholder might be made practically useless, although they would still be liable, to quote from Lord Cranworth in *Salisbury* (*Marquis*) v. *Gladstone* (1861), 9 H. L. Cas. 692, at p. 702, 'to pay their rents and perform their stipulated services to the lord'. Yet the authority of *Broadbent* v. *Wilks* is acknowledged in that case." The learned Law Lord went on to point out that that was his view, but that whether or not it was the correct view he was confident that no sufficient ground had been shown for disturbing the decision in *Hilton* v. *Granville* in relation to the particular manor in question.

Consequently the decision cannot strictly be carried beyond the particular facts, but the case is important for the discussion of the case and for the opinion expressed upon the reasonability of a custom which may operate as a virtual derogation from grant. Here it must be observed, however, that distinction must be drawn between claims based upon immemorial custom and prescription and an express grant. The question in the latter example depends upon the words of the grant: see *Butterknowle Colliery Co.* v.

Bishop Auckland, etc., Co., [1906] A. C. 305; *Butterley Co., Ltd. v. New Hucknall, etc., Co.*, [1910] A. C. 381.

Emergency legislation—mortgage—leave to proceed.—Re Royal Bank of Scotland, [1940] 3 All E. R. 476, is important because it decides that an application for leave to proceed under the Courts Emergency Powers Act to enforce a mortgage can only be made after the date at which by the general law the mortgage could be enforced. The mortgagee, having given notice, dated May 15, to call in the principal, issued the summons for leave to proceed on May 28, although the last date for payment was not until August 15. Bennett, J., held that as the mortgagee could not realise his security until August 15 the application was premature. By August 15 the mortgagor's position might be completely changed and such change might be due to circumstances arising directly out of the war. He, therefore, adjourned the summons with a direction that it was not to be restored until after August 15. It, therefore, appears that no summons for leave to proceed should be issued until the mortgagee could, apart from the Courts Emergency Powers Act, enforce the mortgage.

This case should be compared with the decision in *Re Huddersfield Building Society (Alton)*, [1940] 3 All E. R. 218, where Bennett, J., held that before an application for the appointment of a receiver under the Law of Property Act, 1925, s. 110, could be made it was necessary first to obtain leave under the Courts Emergency Powers Act. The point arose out of the mortgagor having committed an act of bankruptcy on which the mortgagees issued a summons for leave to proceed without first issuing a summons for the appointment of a receiver. It was objected to the summons for leave to proceed that the applicants had no remedy until application had been made for the appointment of a receiver. The learned Judge overruled the objection on the ground that it was the settled practice of the Courts to proceed with the summons for leave to proceed without inquiring whether the powers of the mortgagee had become exercisable.

The result of these two cases appears to be that a summons for leave to proceed may be issued without proof that the mortgagee's powers are exercisable, but if the mortgagor could satisfy the Court that the powers only become exercisable at a future date the summons cannot be heard. On the other hand, if they are immediately exercisable but only with the leave of the Court the summons will not be stayed.

Concurrent leases of coal mine—whether the later lease a "retained interest" within meaning of Coal Act, 1938—Mitford Co., Ltd. v. *Coal Commission*, [1940] 3 *All E. R.* 125 (*Ch. D.*).—The policy of the Coal Act, 1938, was to establish the Coal Commission with powers and duties to become owner of all coal-bearing land, rents and royalties in coal, without participating in the working or getting of the mineral, but to leave in undisturbed possession all lessees, including underlessees, actually working the coal. In 1890 a mining lease, expiring in 1945, was granted to P. B. subsequently acquired the freehold reversion and in 1938 granted to M. a lease for 100 years which was in part a term concurrent with the lease to P., who would continue to work the minerals until his lease expired in 1945. The plaintiff company, M., took out a summons to determine whether their lease for 100 years was an interest which the Coal Commission should acquire, or whether as a "retained interest" under section 5 of the Coal Act, 1938, they would be permitted to retain the benefit of the lease. Farwell, J., considered the preamble and sections 1, 2 and 5 of the Act, the last of which, constituting "*interests in coal or a mine of coal that arise under a coal-mining lease*" (*a*) "retained interests", was of greatest relevance in the case before him. By section 5 (2) any interest arising under a coal-mining sub-demise out of a coal-mining lease, "*or which is, by virtue of any other form of disposition taking effect directly or indirectly out of that lease, held in like manner as if it had been so sub-demised*", and any interest arising under a coal-mining lease where the lessee does not carry on the business of coal-mining, are excepted from the provision of section 5 (1). As the second lease was not a sub-demise, and as the lessee satisfied the question of fact raised by the second exception in proving that he carried on the business of coal-mining, though in a mine other than that involved in the present case, neither exception of section 5 (2) defeated his claim to treat his lease as a reserved interest. Farwell, J., restricting himself to a literal interpretation of the Act, refused to accept the contention that the further wording of section 5 (2) (above) applied to the present concurrent lease to deprive the lessee of his protection under the general provision of section 5 (1).

R. H. G.

Contract for sale of land—purchaser in possession failing to comply with order for specific performance—vendor's application

(*a*) S. 5 (1).

for rescission, possession and forfeiture of deposit—Courts (Emergency Powers) Act, 1939, *s.* 1 (1)—*Broadstairs Picture House, Ltd.* v. *Littman*, [1940] 3 *All E. R.* 419 (*Ch. D.*).—During the past twelve months the wide and intentionally general provisions of the Courts (Emergency Powers) Act, 1939, have frequently, and at times successfully, been pleaded in defence in cases to which they hardly applied. In *Broadstairs, etc.* v. *Littman* Bennett, J., refused relief under section 1 (1) of the Act, providing for leave of Court before enforcement of "*any judgment or order of any court . . . for the payment or recovery of a sum of money*", under the following circumstances. The defendant had purchased land from the plaintiffs and had deposited part of the purchase price with stakeholders, going into possession but failing to complete. The plaintiffs had obtained an order for specific performance of the contract, which was not obeyed, and in the present case moved the Court for rescission of the contract, possession of the property and forfeiture of the deposit. No leave of Court under the Courts (Emergency Powers) Act had been requested by the plaintiffs, but Bennett, J., rejected the defendant's contention that such leave should be obtained, as he did not think the plaintiffs were seeking to enforce the judgment of any Court, saying: "I can see in the remedy for which the plaintiffs are asking nothing in the nature of enforcing any judgment or order for the payment or recovery by the plaintiffs from the defendant of any sum of money" (*b*). The learned Judge accordingly held that the Act did not apply to the case. It is important to note that the only sum asked for by the plaintiffs was a deposit already paid by the purchaser to the vendor's agent. Had the plaintiffs sought to recover the taxed costs incurred in their suit for specific performance, section 1 (1) of the Act would have applied, as the money would have been due under an order of Court.

R. H. G.

Restrictive covenant—application for discharge or modification under Law of Property Act, 1925, *s.* 84—*Re Henderson's Conveyance*, [1940] 4 *All E. R.* 1 (*Ch. D.*).—This decision upon the section of the Law of Property Act allowing discharge or modification of restrictive covenants involves no new question of law. It is chiefly of interest in Farwell, J.'s statements of the general principles involved in proceedings under section 84. In the first place, the decision of the Official Arbitrator, the authority appointed to determine in the first instance the question of modification or discharge of covenants, will not readily be disturbed by the

(*b*) [1940] 3 All E. R., at pp. 421, 422.

Chancery Division on appeal, particularly in technical matters, " unless it was satisfied that he had not given a proper consideration to certain material facts, or had omitted to consider material facts, or had misunderstood the function which he had to fulfil, or had misconstrued the section of the Act " (*c*). With further appeal from the Chancery Division depending upon leave of that Court or of the Court of Appeal (*d*), the importance of the learned Judge's observations needs no emphasis. Secondly, the appeal to the Chancery Division largely takes the form of a re-hearing of the case on all the facts. The words of section 84 are clear enough, and where, as in *Re Henderson*, the application is for modification of a covenant for purely private building purposes when the applicant purchased his land with notice of the covenant and could carry out his building on another part of his land, the provisions of the section will not be construed " to enable a person to expropriate the private rights of another " (*e*). Where no change has taken place in the character of a neighbourhood, as in the present case, the applicant in the case of a conflict between purely private interests stands little chance of obtaining the desired modification. Where public and private interests conflict, as in the case of discharge of a covenant for the purpose of building a hospital or school, the attitude of the Courts is more favourable to the applicant desiring discharge of the restrictive covenant. One is reminded by this practical illustration of Pound's thesis of the securing of interests in their descending order of importance of public, social and individual claims.

R. H. G.

Charities—construction of bequest to " such charitable institution or institutions or other charitable or benevolent object or objects "—Re Diplock; Wintle and Others v. *Diplock and Others*, [1940] 3 *All E. R.* 538 (*Ch. D.*).—This decision is important in restoring a sane administration of justice to what threatened to become a narrow and automatic construction of the words " charitable or benevolent " in testamentary gifts. The testator in *Re Diplock* by his will first made certain specific private bequests, then two specific charitable legacies, and gave the great residue of his property to his executors " *for such charitable institution or institutions or other charitable or benevolent object or objects in England* " as his executors might select. The executors made their selection amongst exclusively charitable objects; and though

(*c*) *Per* Farwell, J., at p. 3.
(*d*) R. S. C., Ord. 54D, r. 8.
(*e*) *Per* Farwell, J., at p. 7.

this choice could not affect the construction which the Court might put upon the terms of the residuary bequest, it was clear evidence of the construction which ordinary men had in fact put upon it. It was contended that the Court had no alternative but simply to hold the bequest void for uncertainty, following *Re Horrocks* (*f*), in which a gift in exactly similar terms had been held void for that reason. Farwell, J., dealt with the point of uncertainty of undefined non-charitable objects which may be comprised within the broad meaning of the word "benevolent", but he strongly vindicated and defined the judicial function in the matter of construction of the term (*g*). Refusing to follow *Re Horrocks* merely because an adverse decision had been reached on a certain formula of words, he based his decision upon the first principle of construing the will as a whole in an effort to discover the testator's intention, and that intention being generally charitable, the learned Judge accordingly held that the disjunctive "or benevolent" did not adversely affect the validity of what was clearly intended as a very generous charitable gift. By the use of the word "benevolent" the testator "did not . . . intend so to extend, and has not, in this particular case, so extended, the scope of his bounty as to bring within the ambit of the powers of the executors objects which are not charitable, because the overriding intention of this will is that only those objects which are charitable in the strict legal sense are to benefit" (*h*). After this decision there is hope that generosity will be less severely penalised, and that a testator's duty of care in the selection of the terminology of his will may be less than the *maxima diligentia* often demanded of him in the past.

R. H. G.

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2. *LANDLORD AND TENANT CASES.*

By LIONEL A. BLUNDELL, LL.M., Barrister-at-Law.

Bankruptcy of lessee—effect as regards rent—rules as to disclaimer.—In *Metropolis Estates Co., Ltd.* v. *Wilde* (1940), 56 T. L. R. 958, one of joint lessees under a lease of a flat made in 1935 for a term of seven years, at a yearly rent of £200 payable by quarterly instalments, was adjudicated bankrupt in 1936 upon a petition presented three days before the lease was entered into. The bankrupt did not disclose his interest under the lease to the Official Receiver, and in due course obtained his discharge which

(*f*) [1939] P. 198.

(*g*) Farwell, J.'s remarks on this point are well worth perusal: see [1940] 3 All E. R., at pp. 543–4.

(*h*) [1940] 3 All E. R., at p. 545.

became effective in 1937. Subsequently the lessors (who at that time knew nothing about the bankruptcy) brought an action against him for the recovery of a quarter's rent which accrued due in September, 1939. This lessee contended that future rent subsequent to the adjudication was a debt provable in the bankruptcy and that his liability in respect of it was therefore discharged when his discharge from bankruptcy became effective. In 1940 the Official Receiver, as the lessee's trustee in bankruptcy, purported to disclaim his interest under the lease, and this also was relied upon by way of defence.

The Court of Appeal, upholding the Common Sergeant, held that the purported disclaimer was void, and this was clearly correct under the Bankruptcy Acts, 1914 and 1926, and the Rules. Section 54 provides that a trustee shall not be entitled to disclaim a lease without the leave of the Court, except in cases prescribed by general rules, and although rule 276 allows disclaimer without leave in certain cases none of those cases was applicable here. The purported disclaimer was therefore, by rule 276 (2), void. The effect of section 54 and rule 276 is set out in *Woodfall* (24th ed.) at p. 868.

The lease remained, therefore, vested in the trustee, having been assigned to him by operation of law although the trustee had hitherto been in ignorance of it : Bankruptcy Act, 1914, s. 53. But the liability under the contract for future rent remained in the lessee (see *Baynton* v. *Morgan* (1888), 22 Q. B. D. 74), and it is clear from *Re New Oriental Bank Corporation* (*No.* 2), [1895] 1 Ch. 753, that the lessors could not prove in the bankruptcy for more than the arrears of rent due and the breaches of covenant which had taken place up to the time of proof. The discharge from bankruptcy releases only (with certain exceptions not relevant here) debts provable in the bankruptcy (section 28), and the lessor's action for rent accruing due subsequently was therefore maintainable.

Liability of landlord for injury to user of highway arising out of defective condition of premises.—In *Heap* v. *Ind Coope & Allsopp, Ltd.* (1940), 56 T. L. R. 948, there was no covenant either by the landlords or the tenant to do external repairs, although the landlords had a right to enter and view and in fact had from time to time carried out necessary repairs. These included some small repairs to a certain cellar flap. Later, the same cellar flap gave way when a passer-by was walking over it in the course of passing along the highway. It was held by the Court of Appeal, following

Wilchick v. *Marks*, [1934] 2 K. B. 56, as modified by *Wringe* v. *Cohen*, [1940] 1 K. B. 229, that as the landlords had reserved a right to enter and do repairs, although not under an obligation to repair, that was sufficient to give the injured third party a right of action against the landlord, without the necessity of proving that the landlord knew of the defect or lack of repair in the property in question.

This case invites comparison with the recent decision of the House of Lords upon the liability of the occupier for nuisance, namely *Sedleigh-Denfield* v. *St. Joseph's Missions*, [1940] 3 All E. R. 349, and the matter is discussed in an article on the subject, Part I of which appears elsewhere in this number of *The Conveyancer*.

Small Tenements Recovery Act, 1838—*jurisdiction of High Court after service of statutory notice*.—The Small Tenements Recovery Act, 1838, provides a summary means for ejecting the tenant of a small tenement by means of proceedings before the justices (see *Woodfall* (24th ed.), p. 1116). The first step is the service by the landlord of a statutory notice to quit under section 1 of that Act. It has now been held by Crossman, J., that the Act does not confer upon the justices an exclusive jurisdiction in respect of premises in relation to which such a notice has been served, but that in a proper case the tenant may bring an action in the High Court for a declaration that, for example, his tenancy is a yearly one and not weekly as alleged in the notice to quit : *Sivyer* v. *Amies* (1940), 56 T. L. R. 876. In that case the tenant desired to call as a witness an old and infirm man who could not give evidence before the justices but whose evidence could be taken on commission in proceedings in the High Court. This circumstance made the case eminently a proper one for the High Court action for a declaration to be brought and a summons to dismiss the action as vexatious accordingly failed.

Payment of sum equivalent to rent due by stranger to tenancy —whether subsequent distress lawful.—Payment or satisfaction of a debt by a stranger to the contract does not discharge the debtor unless it is made by that person as agent for the debtor and with his prior authority or subsequent ratification : see *Simpson* v. *Eggington* (1855), 10 Ex. 845. So where the bailiff who levied the distress had prior to distraining advanced to the landlord (who was a friend of his and aged and poor) a sum equivalent to the amount

of rent in arrear, this in no wise invalidated the distress : *Smith* v. *Cox* (1940), 56 T. L. R. 899. The rent was still owing, and the advance made to the landlord was in no sense a payment of rent on behalf of the tenant.

Landlord's obligation under letting scheme—derogation from grant—nuisance to tenant.—Newman v. *Real Estate Debenture Corporation, Ltd.*, [1940] 1 All E. R. 131, affords an instance of a letting scheme, binding upon the landlord as well as upon the tenants, restricting the user of a small block of flats to residential purposes. The case should be read in conjunction with those mentioned in *Woodfall* (24th ed.) at pp. 563 to 565 and 638 to 639. The party using the premises in breach of the scheme was a company which, itself a lessee, had, subsequently to the grant of a lease from the landlord to the plaintiff of a flat in the building, procured the grant of a lease of the whole building with the benefit of the plaintiff's subsisting lease. The company therefore acquired, so far as the plaintiff's flat was concerned, a *concurrent lease* which vested in them the reversion upon the plaintiff's lease (see *Woodfall* (24th ed.), p. 262).

The company being thus a purchaser of the reversion, Atkinson, J., considered whether they were bound by the implied covenant on the part of the landlord under the letting scheme, in view of the fact that the covenant was not registered. In fact, however, a covenant or agreement made between a lessor and lessee is not registrable either under the Land Registration Act, 1925 (see section 50 (1)), or under the Land Charges Act, 1925 (see section 10 (1), Class D (ii)), and therefore a purchaser is not by the mere fact of non-registration exonerated under section 199 (1) of the Law of Property Act, 1925, from the consequences of being affected by notice of the covenant. The company here knew all the essential facts raising the presumption that there was a letting scheme, and the Court dealt with the case on the footing that they had actual notice of facts which would upon inquiry have brought the scheme to their attention. It seems to the writer, however, that irrespective of the question of notice the obligation under the landlord's implied covenant would be annexed to the reversionary estate immediately expectant upon the term granted by the plaintiff's lease, that is to say, would be annexed to the company's lease, by virtue of section 142 (1) of the Law of Property Act, 1925.

The same case provides an instance of derogation from grant on the part of a landlord, since the business user for which the rest of

the building was let rendered the flat materially less fit for the purpose for which it was demised (see *Aldin* v. *Clark*, [1894] 2 Ch. 437; *Harmer* v. *Jumbil (Nigeria) Tin Areas, Ltd.*, [1921] 1 Ch. 200; and *Woodfall* (24th ed.), p. 568), and at the same time there was an actionable nuisance by noise which materially interfered with the ordinary comfort of human existence in the flat, within the definition laid down in *Walter* v. *Selfe* (1851), 4 De G. & Sm. 315: compare *Vanderpant* v. *Mayfair Hotel Co., Ltd.*, [1930] 1 Ch. 138.

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3. *WILL CASES.*

By S. J. BAILEY, LL.M., Barrister-at-Law.

Administration of assets—future contingent liability—distribution of estate.—The position of an executor who distributes the deceased's estate without making provision for a known contingent liability appears now to be reasonably clear. In *Re King*, [1907] 1 Ch. 72, Neville, J., considered a number of mysterious *dicta* from earlier decisions and appears to have reached the following conclusions: (i) The Court will not order assets to be set aside for the protection of contingent creditors: they must be content with such remedies as naturally remain to them against the residuary legatees and the executors. (ii) The Court will order assets to be set aside for the protection of an executor against contingent creditors, but will do so only if he needs such protection. (iii) The executor does not need such protection if he distributes (a) under an order of the Court made after full disclosure by him, or (b) under the protection of Lord St. Leonards' Act (now section 26 of the Trustee Act, 1925); for in either case he retains no personal liability: should the contingent liabilities mature the creditors' remedies will be against the beneficiaries who have received the assets. Similarly, in these latter circumstances, the executor needs no protection by way of indemnity from the beneficiaries when distributing the estate amongst them. (iv) Where, however, the executor has some personal liability beyond his liability *qua* executor (*e.g.*, if he has taken possession of the deceased's leaseholds and has thereby incurred an abnormal liability through privity of estate) it appears (a) that the Court, when ordering distribution, will direct assets to be set aside for his protection (*Re Nixon*, [1904] 1 Ch. 638) and (b) that a similar precaution is required in a distribution out of Court (his statutory protection under section 26 of the Trustee Act, 1925, covering only his liability *qua* executor: see *Wolstenholme & Cherry's Conveyancing Statutes*, 12th ed., 1307). In

Re Johnson, Johnson v. *King Edward Hospital Fund for London*, [1940] W. N. 195, a summons in chambers (reported by leave of the Judge), Crossman, J., followed the principle of the above decision in *Re King*, and made a declaration authorising executors to distribute a testator's residuary estate without providing for known contingent liabilities which were likely to arise in virtue of a covenant made by him in an *inter vivos* settlement.

Administration of assets—order of application of assets for payment of debts—whether statutory order displaced by deceased's will.—By virtue of section 34 (3) of the Administration of Estates Act, 1925, the property of a deceased person who dies solvent is applicable, *subject to the provisions if any contained in his will*, towards the discharge of his funeral testamentary and administration expenses, debts and liabilities, in the order mentioned in Part II of the First Schedule to that Act. The order prescribed by Part II of the Schedule places undisposed-of property and residuary gifts above property specifically designated (*i.e.*, "appropriated or devised or bequeathed") for or charged with the payment of debts; yet its final words show, as does its parent subsection, that the order *may be varied by the will of the deceased.* This raises the obvious difficulty that, when a testator by his will has specifically designated or charged certain items of his property for the payment of his debts, he presumably intended that property to be primarily liable before all other of his property; and it would therefore appear that he has thereby displaced the statutory order. The question thus arises whether the statutory order, as regards property so designated or charged, can ever apply. This problem was considered in *Re Kempthorne*, [1930] 1 Ch. 268, where the dilemma was recognised both by Maugham, J., and by the Court of Appeal. Maugham, J., suggested the solution that the Act should be construed to mean that, although a contrary intention shown by the deceased's will operates to oust the statutory order, the fact that a will specifically appropriates or charges certain property for the payment of debts does not *per se* constitute such a contrary intention. The Court of Appeal, however, found it unnecessary to consider this difficulty; for they were able to overrule him on the ground that no property of the deceased had in fact been appropriated or charged, within the meaning of the Act, by the will in question. The problem has now been raised again, in *Re Gordon, Watts* v. *Rationalist Press Association, Ltd.*, [1940] 1 Ch. 769. Here a testatrix had bequeathed £50 to her

executors in trust thereout to pay her debts, funeral and testamentary expenses, and to pay any balance of that sum to a certain society. The question thus arose whether her debts should be paid primarily from that £50 (to the diminution of the society's legacy) or out of her undisposed-of residue. Bennett, J., adopted the latter alternative. He based his decision upon the *dictum* of Maugham, J., in *Re Kempthorne*, *supra*, to the effect that the provisions of the Act should be reconciled by construing them to mean that a specific appropriation of, or charge upon, property for the payment of debts is not a contrary intention such as will vary the statutory order; and he held that there was no hint of a suggestion, in the judgments of the Court of Appeal in that case, that the learned Lords Justices there had disagreed with this part of Maugham, J.'s, decision. Unfortunately, it seems from *Re Littlewood*, [1931] 1 Ch. 443 (a decision to which Bennett, J., apparently did not refer in the course of his judgment) that Maugham, J., after thus being overruled by the Court of Appeal, himself felt disinclined to adhere to his earlier *dictum*: for, in *Re Littlewood*, he gave judgment (on like facts) to the effect that a charge of debts upon specific bequests operated to oust the statutory order, to the exoneration of property comprised in a residuary gift. Although, therefore, there may be much to be said in favour of this new decision, it might have been more helpful had the judgment indicated precisely how it is distinguishable from the decision in *Re Littlewood*.

Administration of assets—power of appropriation—duty payable in respect of appropriations with consent.—When an express power of appropriation is conferred upon executors by the deceased's will, to be exercisable with the consent of the beneficiary thereby affected, any such appropriation has been regarded as contractual in character. Accordingly, unless the power provides that no consents shall be required, such an appropriation is chargeable with *ad valorem* duty as a "conveyance or transfer on sale" under the Stamp Act, 1891; for the legatee is regarded as having employed his legacy in purchasing the specific assets appropriated to him by the executors. The question has now arisen, in *Jopling* v. *Inland Revenue Commissioners*, [1940] 2 K. B. 282, whether an appropriation under the new statutory provisions of the Administration of Estates Act, 1925, s. 41, is in substance contractual when made with the statutory consents. Lawrence, J., decided that it is, and that it does not differ in any material degree

from express powers of appropriation conferred before the Act. It would seem, therefore, that the *ad valorem* duty chargeable in such a case can be avoided only by inserting in the will a clause which eliminates the consents prescribed by section 41.

Construction—" charitable or benevolent object or objects "—overriding intention of charity.—That a trust for " such charitable or benevolent object or objects as X shall select " is likely to fail for uncertainty was illustrated by the recent decision of the Court of Appeal in *Re Horrocks*, [1939] P. 198, noted *ante*, vol. 3, p. 350. The phrase " charitable *and* benevolent " is less dangerous; for it is more likely to be construed to comprise only objects which are charitable in the legal sense. On general principles of construction, however, a word may be used in such a context as to show that the testator used it in some secondary sense. Accordingly, although the primary meaning of the word " benevolent " is wide enough to embrace objects which are not charitable (and thus tends to cause the gift to fail for uncertainty), on reading the context or the will as a whole it may become evident that the testator employed the word " benevolent " in a narrower secondary sense, restricted for instance to benevolence of a type which is charitable in the eye of the law. In such a case no uncertainty attaches, and the trust is valid. Farwell, J., has recently applied this type of reasoning in *Re Diplock*, *Wintle* v. *Diplock*, [1940] W. N. 286; [1940] 3 All E. R. 538, where a testator had left the residue of his estate upon trust " for such charitable institution or institutions or other charitable or benevolent object or objects " as his executors might in their absolute discretion select. Apparently the executors, after distributing the residue among selected charities, were then faced with a claim from the deceased's next-of-kin that the trust of the residue was void for uncertainty. The learned Judge was satisfied, on reading the will as a whole, that the words " or benevolent " were here controlled by an overriding intention to benefit strictly charitable objects only: he therefore held that the trust of the residue was valid. As is to be expected in cases on a construction controlled by the general impression given by the will as a whole, it is not easy to state precisely what indications in the will led to this result, but it would seem from the judgment that weight was given to the manner in which the will, after conferring various benefits upon individuals, proceeded to give a number of so-called " charitable legacies " to charitable objects particularly described and then to

leave the residue to such charitable institutions and cognate objects as the executors should select. This enabled the learned Judge to conclude that, after specifying the individual beneficiaries, the testator had definitely turned his mind to disposing of the remainder of his property for charitable purposes.

Construction—gift over on death of donee "leaving no child or children".—As a general rule the word "children", unlike the word "issue", means descendants of the first generation only. It is, however, a general principle of construction that the primary meaning of a word may be displaced by some secondary meaning if such an intention is evident from the document in question. *In the Estate of Thomas Milward*, [1940] 1 Ch. 698, concerns a devise to Emma with a proviso in the nature of a gift over "should the said Emma depart this life leaving no child or children". The testator died in 1851. Emma died in 1920, leaving two grandchildren, her only child (their parent) having predeceased her. Farwell, J., held, on the construction of the will as a whole, that the testator's paramount object was to benefit Emma and that he did not intend the gift over to operate unless she should die leaving no descendants. He therefore held that the words "leaving no child or children" should be read in a secondary sense as meaning "leaving no issue". It is clear from the earlier cases (as is stated in *Theobald on Wills*, 9th ed., p. 589) that the Court may thus find a secondary meaning for the phrase "leaving no child or children". But the argument (as suggested in *Jarman on Wills*, 7th ed., vol. iii, p. 1698) that there exists a definite rule of construction whereby such words, in a gift over after an absolute gift, should be read to mean "issue" was held to be incorrect. The words bear their natural primary meaning unless the context justifies a departure therefrom.

Construction — option to purchase given by will — whether personal to donee.—If a will confers an option to purchase at or within some specified time specific property comprised in the testator's assets, and the donee of the option dies without having exercised it, the question whether the option dies with him or is exercisable by his executors is one of construction. This, at least, is clear from the judgments of the Court of Appeal in *Re Cousins* (1885), 30 Ch. D. 203. There the testator, a hotel-keeper, gave

by his will to his son an option to purchase his hotel, and was held to have intended it as a mere personal option for him only. Although in some text-books this decision is given as authority that all testamentary options are *prima facie* personal to the donee, it is by no means easy to find authority for such a rule of construction in the judgments in that case. The question has now been raised again, before Bennett, J., in *Re Sykes, Younghouse* v. *Sykes*, [1940] 1 Ch. 490, where the will conferred upon the testator's son an option to purchase his interest in the shares of a certain company. The son outlived the testator, purported to assign the option to the trustees of a certain settlement, and died shortly afterwards. Thereupon both the trustees of the settlement and the son's executors purported severally to exercise the option. Bennett, J., held that they had no power to do so, such an option being personal to the donee unless the will which created it indicates a contrary intention. The learned Judge based this decision upon *Re Cousins, supra*, stating that, although at first inclined to hold the contrary, he had come to the conclusion that a careful study of its *dicta* establishes that such is the rule.

Construction—gift to children of such named donees as "shall die in my lifetime"—words of futurity.—When a will uses words of futurity they must be construed strictly in a future sense, unless there is some context indicating a contrary intention. Such was the decision of the Court of Appeal in *Re Walker*, [1930] 1 Ch. 469, where the many authorities on substitutionary gifts were reviewed. The effect of a context to the contrary was shown in *Re Birchall*, [1940] 1 Ch. 424, C. A. (noted *ante*, vol. 4, p. 335), where a gift over to the children of such potential members of a class as "*shall die* in my lifetime" was construed to mean the children of those who "*shall have died* in my lifetime", and so included the children of one who had died before the will was made. A similar question has now arisen in *Re Booth's Will Trusts, Robbins* v. *King*, [1940] W. N. 114. Here the gift was to such of certain named persons "as shall be living at the date of my death", with a provision that "if any of such persons *shall* die in my lifetime and leave children, then such children shall take the share which their parent would have taken if he or she had survived me and obtained a vested interest". *Prima facie* such words would not include the children of one who was already dead when the will was made. In the present case, however, the original gift was to *named* persons (it was not a

class gift), and the testatrix was well aware, when she made the will, that one of those named persons was already dead. Farwell, J., therefore held that she must have intended the gift over to children to extend to the children of the named donee whom she knew to be dead—there would otherwise have been no point in naming the deceased as a potential donee. He therefore construed the words "shall die" as meaning "shall be dead or shall die"; and he pointed out that it is easier thus to construe words of futurity in a gift to named individuals than is the case in a class gift.

Industrial and provident societies—nomination under Industrial and Provident Societies (Amendment) Act, 1913, s. 5—death of nominee in lifetime of nominator—lapse.—By virtue of the Industrial and Provident Societies (Amendment) Act, 1913, s. 5, a member of such a society, not being under the age of sixteen years, may nominate a person or persons to whom his property in the society, to a maximum of £100, shall be transferred at his death. Such a nomination, though not revocable by the nominator's will or codicil, can be revoked by a subsequent nomination or by written notice to the society. Moreover, it is ambulatory in character; for it affects only such of the nominator's property in the society "as may be his at the time of his decease". *Re Barnes, Ashenden* v. *Heath*, [1940] 1 Ch. 267, has now raised the question whether such a nomination fails if the nominee dies before the nominator. Apparently the only previous decision on the point was *Caddick* v. *Highton* (1899), 68 L. J. Q. B. 281, in which Phillimore, J., had held that the deceased nominee's personal representatives are entitled to claim in his stead, the nomination being treated as analogous to the exercise of a power of appointment by deed. That decision, however, is inconsistent with certain *dicta* in *Eccles Provident Industrial Co-operative Society, Ltd.* v. *Griffiths*, [1912] A. C. 483, to the effect that these nominations are of an ambulatory nature and were introduced in order to save the expense of making a will; moreover, the Chief Registrar of Friendly Societies has refused to follow it. Farwell, J., in *Re Barnes, supra*, has now decided that such a nomination is testamentary in character and lapses if the nominee predeceases the nominator. Collateral difficulties, such as whether section 33 of the Wills Act, 1837, applies to such nominations, can, in the words of Farwell, J., be dealt with if and when they arise.

Devise—whether upon condition or upon trust—whether gift accepted by devisee—effect of implied assent in favour of devisee after 1925.—In *Re Hodge, Hodge* v. *Griffiths*, [1940] 1 Ch. 260, the plaintiff was sole proving executor of the will of his deceased wife. She had specifically devised to him two freehold houses " in consideration of him paying to my sister Constance the sum of £2 per week during her life ", with a direction that should he dispose of the houses " the annuity of £2 per week shall cease and in lieu thereof he shall invest the sum of £2,000 in authorised securities " in the joint names of three named persons (including himself and the sister) to be held by them upon certain trusts. The will concluded with a general residuary gift to the husband absolutely. On these facts, Farwell, J., held that the specific devise of the houses amounted to a gift on a condition, and accordingly that, on accepting the gift, the husband became fixed with a personal obligation to make the payments stipulated by the will. Two substantial questions were involved in this decision : first, should the stipulations as to the payments to be made be construed as imposing a condition or as creating a trust; second, had the husband in fact accepted the gift, or was he at liberty to disclaim it—whereupon it would fall into the residue and pass to him with the residuary estate unconditionally. It was argued that the testatrix could never have intended to allow her husband, by disclaiming the gift, to evade making the stipulated payments and yet obtain the property beneficially, and hence that the gift should be construed as creating a trust of the property. The learned Judge, however, held that the language of the will so strongly pointed to a gift upon condition that this latter construction must prevail. He held further, on the facts, that the husband had impliedly accepted the gift, and so, having lost his right to disclaim, had incurred a personal obligation to make the prescribed payments. This part of the decision involved questions as to assents by conduct. The husband, as sole proving executor, had proved the will in 1934. Although the net rents of the houses were insufficient to provide the prescribed payment of £2 a week to Constance, he had paid them to her from the date of the death until 1939 and had added over £200 from his own pocket in order to make them up to the stipulated figure. He then sold the property; but although the price exceeded £2,000 (the sum which the will thereupon required him to invest upon prescribed trusts), the net proceeds of sale after deducting various registered charges upon the property amounted to considerably less than £2,000. It was argued that his conduct had been entirely

consistent with that of a mere personal representative who had regarded himself, at most, as a trustee of the houses. Nevertheless, the evidence was held to show plainly that he had accepted the devise and had in fact treated himself as the owner in equity of the property. Nor, it was held, does section 36 (4) of the Administration of Estates Act, 1925, affect the matter in a case of this kind. Although that section requires a *written* consent in order to pass the legal title to a devisee, the devisee in the present case had the legal title already in him as personal representative, and "his equitable interest as devisee depends upon equities and upon whether or not he has done acts which must be treated as amounting to sufficient evidence of assent" (p. 264). The implications of this part of the decision appear to be (i) that an executor-devisee, at any rate if he is sole executor, requires no written assent unless he desires to make title to the legal estate as beneficial owner, and (ii) that although an assent inferred from the conduct of personal representatives cannot, after 1925, pass a *legal* estate, it may still operate in equity and so convert the personal representatives into trustees for the devisee.

Construction—special power of appointment—whether exercised by bequest of "my" shares.—A bequest of "my" property of a certain description (*e.g.*, "my shares in the X Company") by a testator, who had a testamentary special power of appointment over certain property answering to that description but who had no other property of that description, will ordinarily show a sufficient intention to exercise the power. It seems, however, that the authorities are in conflict as to the position where such a testator had also property of his own falling within the description. On principle the better view would appear to be that such a bequest cannot ordinarily be construed as showing the necessary intention to exercise the power. This view has now been adopted by Bennett, J., in *Re Waldron*, *Waldron* v. *Errington-Wales*, [1940] W. N. 248; [1940] 3 All E. R. 442, where a testatrix had bequeathed "my shares in the *X* Co. and my shares in the *Y* Co." to trustees upon certain trusts. By virtue of certain settlements she had, subject to her life interest therein, special powers of appointment over certain shares in these two companies; she also possessed shares of her own in the *X* Co., though not in the *Y* Co. The learned Judge held accordingly that the bequest operated to exercise her power of appointment over the shares in the *Y* Co., but showed no intention to exercise her power of appointment over those in the *X* Co.

Guardianship of infants—illegitimate child—power of mother to appoint testamentary guardian.—Section 5 (2) of the Guardianship of Infants Act, 1925, provides that "the mother of an infant may by deed or will appoint any person to be guardian of the infant after her death". In *Re A., S.* v. *A.*, [1940] W. N. 271, one of the questions raised was whether the mother of an illegitimate child can thus appoint a testamentary guardian for that child. Although the Act does not expressly deal with this point, its schedule as to the consents required to the marriage of an infant states that, in respect of an illegitimate infant, the consent required is that of the mother or, if she be dead, the guardian appointed by her. Bennett, J., therefore decided that the Act impliedly empowers her to appoint a guardian for such a child.

Inheritance (Family Provision) Act, 1938—order for maintenance of dependants out of deceased's estate.—Two cases relating to the Inheritance (Family Provision) Act, 1938, have recently been decided. *Re Vrint, Vrint* v. *Swain*, [1940] W. N. 283; [1940] 3 All E. R. 470, decided first that the Court (as is clear from sub-section 7 of section 1) is entitled to seek the testator's reasons for failing to provide adequately for a dependant and can receive for this purpose evidence which would not normally be admissible in a Court of law. Further, this case appears to decide that the Act is inapplicable if the estate is so small that no reasonable provision for maintenance is possible. The net estate, amounting to £138 14s., had been bequeathed by the testator to his executor. The dependant applying for maintenance thereout was the testator's widow. Section 1 (4) enabled the Court to order that she be paid up to one-half of that sum. Although it would seem that she had only 10s. a week with which to maintain herself, Bennett, J., appears to have held that it was unreasonable of her to apply to the Court for maintenance out of such a small estate: he accordingly dismissed the application. It is not easy, however, to find in the Act any suggestion that it was not intended to apply to small estates.

The second case concerned with the Act is *Re Liddington, Liddington* v. *Thomas*, [1940] 3 All E. R. 600, decided by Farwell, J., who ordered payment of the income of two-thirds of the net estate to the widow of the deceased. The following among other points arose: (i) Although the widow was the sole applicant for maintenance, there were two infant children in her custody for whom no application was being made; nevertheless, the maximum

maintenance was ordered, and the order was made subject to an undertaking by her to maintain the children during their infancy. (ii) In view of the then uncertainty (due to contingent liabilities under a lease) as to whether the net value of the estate was under £2,000, so as to enable the Court to order maintenance out of capital, liberty to apply was given to the widow. (iii) The learned Judge, interpreting a somewhat obscure passage in the Act, held that the maximum figure for maintenance (namely the income of two-thirds of the net estate—section 1 (3)) is the maximum total maintenance which the dependants together can claim under the Act as a joint result of any benefits they are receiving under the will and any order of the Court for the time being in force.

THE LIBRARY.

Conditions of Sale of Land. By E. O. WALFORD, LL.D. (Lond.). London: Sweet & Maxwell, Ltd. 1940. xxiv and 352 pp. (17*s.* 6*d.* net.)

This work is substantially a reproduction of a series of articles which have appeared in *The Conveyancer*. As this series commenced in 1936 the work has been revised and brought up to date by the addition of references to, or notes of, more recent cases.

Whilst this book does not attempt to deal with matters arising under the Courts (Emergency Powers) Acts, Appendix B deals generally with "The War and Sale of Land". This Appendix, which is a reproduction of an article which appeared in *The Conveyancer* for March, 1940, contains a suggested condition dealing with war damage, and raises a question of particular interest at the present day. It is understandable that a purchaser is willing in peace time that the property should be at his risk after contract, if indeed he is aware of the legal position. At the present day it is unlikely that a purchaser will be willing to buy property upon the footing that he must pay the full price even if the house which he has purchased has been reduced to a pile of rubble. The condition above referred to gives to the purchaser a right of rescission in such cases, and also covers cases in which the damage is less extensive. The doctrine of frustration, the destruction of chattels agreed to be sold, and the subject of trading with the enemy are also dealt with in this Appendix.